Purpose of the Brief.

It is to show—

First. The case is one involving the rights of individual citizens of the United States, whom, the petition charges, conspired to and did restrict and monopolize interstate trade in oil in contravention of the Sherman Act.

The court below so held, and in that erred, because:

(A) The Government failed to so prove:

(B) The things the individuals did do were lawful and not forbidden by the Sherman Act.

Second. The court below held that because (*and solely because*) the individual joint owners of a group of non-competitive properties engaged for forty years in private trade in the manufacture and sale of oil, instead of continuing to so hold through nine trustees under the control of the seven individual appellants, changed in 1899 the *method* of holding their properties by conveying them to the Standard Oil Company of New Jersey, but still under the management of the seven—*that such change* in the method of holding titles was a violation of the Sherman Act, and had been so ruled by this court in the Northern Securities case.

This, we submit, is plainly and markedly erroneous.

THIRD. As proven by the evidence, the Standard Oil business as it existed in 1906, and still exists, was the natural development and outgrowth of the business begun in 1862, and steadily pursued by the Rockefellers and others. By untiring energy, with infinite skill—with abundant capital and the steady reinvestment of early profits, these men and their associates created out of an entirely new, unique and unprecedented production of crude oil, a new, universally used and cheapest illuminant the world has known. By creative skill they secured from refuse oil valuable by-products. They invented the huge reservoirs for storing oil—the combined pipe line system which gathers up and carries the natural products—the tank cars which carry the refined product. They created the export trade in oil, transporting it in ships of their own construction, and selling it in Asia, India, China, Japan, Russia and all Europe. They devised the trading stations—the tank delivery wagons—and used every means to cheapen the product and the quality. From 1862 to 1906 (44 years) the work went on. They took the risk of the failure in production, of destruction by fire and tempest, besides all the ordinary risks of trade. They met all emergencies with competent skill and sufficient funds. The unexpected, enormous increase in production greatly increased their business and added to its importance and profit. Their methods of holding their joint properties and the management of them were dictated by economic reasons. They used the best and cheapest methods in the holding of titles, and in the transportation, production, refining and sale of oil, and they sought to and did always produce the best and cheapest product.

They competed with the same energy and skill they built up.

They succeeded, as if one had developed unexpectedly a gold or diamond mine, and abundant revenue legitimately became theirs.

Their business thus created was a lawful one, and the owners thereof were and are lawfully entitled to continue the same, and if in 1906 when the petition was filed, they were not restricting interstate trade or by unlawful means seeking a monopoly (which it was not), the court should not have interfered with it.

And yet without finding any such illegal acts or any illegal act, and after forty-four years of this toil and strife and enterprise and skill and devotion to one business, and after energies spent by a remarkable group of men, and when the harvest was being gathered for their nigh half century's work, then in 1910 the court below struck them down and disintegrated their organization,—and why—

Not because in 1906 they were restricting interstate trade, or by then unlawful means were maintaining a monopoly—

Not because they had by force or fraud or illegal acts eliminated their competitors and gained in an unlawful way the control of the interstate trade in oil—

But *solely* and *only* because in 1899 they conveyed all *their* property to the Standard Oil Company of New Jersey which (the court below held) was a violation of the Sherman Act.

Before they so conveyed, they were a lawful group, lawfully doing business—

After the conveyance, and solely by reason thereof, a group of lawless conspirators.

With great respect for the Bench which so held, we submit that such a rule is not justified by any possible construction of the Sherman act nor sanctioned by any ruling of this court.

The Court erred in making the decree it did—

FOURTH. In this equitable proceeding the Sherman Act only gave the court (See Section 4) after petition filed

"setting forth the case"

"jurisdiction to prevent and restrain violations of this Act"—

"to prevent and restrain such violations"

"such violation shall be enjoined or otherwise prohibited".

The power is plainly only preventive and negative; it is to prevent the continuing, then existing violations of the Sherman Act—or such foreseen and expected and at present arranged violations.

Yet the Court below entered a decree which (in results) orders a dissolution of the Standard Oil Company of New Jersey. Divides its now united plant into many units which were not competitive, and compels competition. Creates new

units where none existed before. Prevents the use of units with each other. Restricts appellants to the joint ownership of only one unit. Segregates into units properties actually built with appellants' money for necessary joint use in the economical conduct of appellants' business. Regulates the ownership of real estate in different States. Compels the appellants to continue their business (if at all) with these separated units at the risk of an attachment for contempt under a vaguely worded decree; and restricts the appellants from any participation in interstate commerce until such dissolution of the Standard Oil Company of New Jersey is effected.

FIFTH. The Government not having appealed cannot assign error to the decree of the Court below, or object to its findings of fact, or ask to have additional facts found which the Court below did not find. If the facts found are not sufficient to support the decree, it must be reversed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 725.

STANDARD OIL COMPANY ET AL., Appellants,

vs.

THE UNITED STATES.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Brief on the Law on Part of Appellants.

Argument.

I.

THE GOVERNMENT HAS FAILED TO MAINTAIN THE AFFIRMATIVE OF THE ISSUE MADE BY THE PLEADINGS, AND TO PROVE THAT THE SEVEN INDIVIDUAL APPELLANTS, AS A MATTER OF FACT, WERE, WHEN THE PETITION WAS FILED, IN CONTROL AND MANAGEMENT OF, AND DICTATED TO, THE OTHER DEFENDANTS IN THE BILL IN AN EFFORT TO RESTRAIN INTERSTATE TRADE OR MONOPOLIZE ANY PORTION OF THE SAME IN CRUDE PETROLEUM AND ITS PRODUCTS, CONTRARY TO THE PROVISIONS OF THE SHERMAN ACT, AND THE COURT BELOW ERRED IN HOLDING TO THE CONTRARY.

It is a familiar rule that when the Sovereign, either the State or the United States, comes into a court as a suitor, she stands exactly as the citizen with whom she disputes, and can claim no other or higher or greater privileges than that citizen. She is governed by the same rules of law and equity that govern the citizen. She is subject to the rules of pleading, not in a proceeding like this under the Sherman Act to common law precision, but still she is subject to those rules of pleading which imperatively require that the Petition and the Answer and the other pleadings must frame *an issue,* and *the issue,* when once framed, is the sole point to which the testimony in the case should be directed; and the solution of the issue is the termination of the case.

In *Brent vs. The Bank,* 10 Peters, 615, the Supreme Court said:

> "Thus compelled to come into equity for a remedy to enforce a legal right, the United States *must come as other suitors,* seeking in the administration of the law of equity relief. * * * This court, in *Mitchell vs. U. S.,* 9 Pet., 743, have recognized the principle in the common law, that though the law gives the King a better or more convenient remedy, he has *no better right in court than the subject* * * *."

In *The Siren,* 7 Wallace, 154, the court said that the United States as a suitor stands:

> "in such proceedings, with reference to the rights of defendants or claimants, *precisely as private suitors,* except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."

No matter what latitude has been given to the form of these petitions under the Sherman Act, it must still be true that the Petition *must* state, in a definite and plain way, its cause of action; that the Answer must respond to these allegations, and the replication must seal the issue.

In *Swift & Company vs. United States,* 196 U. S., 395, Mr. Justice Holmes said, in discussing the sufficiency of a Petition, that, while it need not have the precision of an indictment one hundred years ago,

> "It is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech."

What Should the Petition Contain?

It should substantially comply with Rule 26 of the Supreme Court of the United States, and should—

"be expressed in as brief and succinct terms as it reasonably can be."

Daniels Ch. Pl., Vol. 1, p. 314, lays down the rule thus:

"In all cases the bill must contain as concisely as may be a narrative of the material facts, matters and circumstances on which the plaintiff relies."

On star page 605, the same author states as to a petition, that it—

"must state the material facts upon which the application is founded."

Pleadings.

What is the issue made by the pleadings?

Let us examine at some length the Petition and its Prayers and the Answers:

The charges in the Petition by the United States (Record Vol. A, page 6) are that seven men named as defendants have engaged in a conspiracy to restrain interstate trade in and to monopolize such trade in petroleum and its products. That in 1870 the original conspiracy was formed by John D. Rockefeller, William Rockefeller, and Flagler; afterwards Archbold, Payne, Rogers and Pratt, between 1870 and 1882, joined them.

These seven men are the individual defendants named in the Petition. The Petition alleged that the original conspiracy formed in 1870 extended over the entire time from 1870 to the present date and still exists. That it has been (Rec. A, p. 7),

> "a continuing conspiracy organized and controlled by the individual defendants herein and has assumed various forms and devices and has covered various periods."

It is one identical, continuous conspiracy which the individual defendants originated in 1870, and have ever since continued. Whatever form it took, it was one the seven individual defendants used as a means to carry it on. Now it was a partnership, now a limited partnership, now a corporation, and now a trust; but the petition with reiteration avers that always it was the seven defendants as individuals in control. They may have used other men to help them, or all kinds of companies, combinations, corporations or trusts, but always it was the seven individuals who used them and were in control.

Referring to different pages of the Petition, we find the following averments:

(Rec. A, p. 6-7):

> "That the defendants, John D. Rockefeller, William Rockefeller and Henry M. Flagler, in or about the year 1870, and at all times since said time, together with the other individual defendants herein, who thereafter from time to time, between said time and 1882, joined said conspiracy, to-wit, Henry H. Rogers, John D. Archbold, Oliver H. Payne and Charles M. Pratt entered into and have ever since been engaged in a conspiracy with each other, and with other persons, corporations, co-partnerships and limited partnerships,

as hereinafter more particularly stated, to restrain the trade and commerce in petroleum, commonly called 'crude oil,' in refined oil, and in other products of petroleum, among the several States and Territories of the United States, the District of Columbia and with foreign nations, and to monopolize the said commerce.

"That said conspiracy extended over the entire time since about the year 1870 until the present time, and still exists, and that the same finally in or about 1899 culminated in the corporate form of said conspiracy, hereinafter more particularly described, which has continued during each and every year until the present time between said individual defendants, the defendant Standard Oil Company of New Jersey, and the various other corporations, defendants herein, and that throughout said period from about 1870 to the present time, said conspiracy has been maintained for the purpose and with the effect of restraining the commerce in said products among the several States and Territories of the United States and the District of Columbia and with foreign nations; and for the purpose and with the effect of monopolizing the commerce in said products in and among the several States and Territories of the United States and the District of Columbia and with foreign nations, as hereinafter more particularly alleged; that said conspiracy has been a continuing conspiracy, organized and controlled by the individual defendants herein, and has assumed various forms and devices, and has covered various periods, among the principal of which are the following:

"The period from 1870 to 1882; the period from 1882 to 1899, and the period from 1899 to the present time."

(Rec. A, p. 72:

"That said conspiracy has been a continuing conspiracy organized and controlled by the individual defendants herein and has assumed various forms and devices."

Without cumbering the record with further extracts, see also following pages of the Petition in Volume A: 7, 8, 9, 11, 12, 14, 16, 18, 19, 20, 31, 32, 37, 39, 41, 42, 43, 46, 49, 50, 57, 59, 60, 97, 98, 107, 110.

Answers.

Many answers have been filed, but they all agree in this:

Each unequivocally and broadly denies these averments of the Petition. They deny all charges that there ever was, by the appellants or any of them, a conspiracy in restraint of interstate or foreign trade and commerce in crude oil, or that any of the appellants had monopolized or attempted to monopolize interstate or foreign trade in crude oil and its products.

What is the Issue?

We have analyzed the petition and read its charges and the appellants' answer, and we have seen that the issue is the charge made in the petition, denied in the answer, and re-asserted in the replication, and it is that the seven individuals (repeatedly called throughout the petition the "individual defendants," being John D. Rockefeller, William R. Rockefeller, John D. Archbold, Oliver H. Payne, Henry M.

Flagler, Charles M. Pratt and Henry H. Rogers), combined and conspired, and continued to combine and conspire at the time when this petition was filed, to restrain interstate trade in oil and to gain a monopoly of the same. It is reiterated on half of the pages of the petition. The conspirators are always identified as the "seven individual defendants," and it is averred that these individual defendants worked through various corporations, and partnerships and limited partnerships, and the petition always alleges that these individual defendants controlled all these partnerships and limited partnerships and corporations, and used them as their tools to effectuate the conspiracy. The answer denies these averments.

It is not important here and we assume (for sake of the argument) that if there was such a continuing conspiracy (?) as charged in the petition, each one of the corporations used by the seven individual defendants became a party to the conspiracy by aiding or abetting (*U. S. vs. S. O. Company*, 152 Fed. Rep., 294); but the Court below said that—

> "The alleged conspiracy is one. Its scheme is single. It has but one object."

Undoubtedly, then, this one alleged conspiracy is that charged in the petition (Rec. A, p. 6), as follows:

> "That the defendants, John D. Rockefeller, William Rockefeller, and H. M. Flagler, in or about the year 1870, and at all times since said time, together with the other individual defendants herein, who thereafter, from time to time, between said time and 1882, joined said conspiracy, to-wit: H. H. Rogers, John D. Archbold, Oliver H. Payne and Charles M. Pratt, *entered into and have ever since*, been engaged in a conspiracy with each other and with other persons, cor-

porations, co-partnerships and limited partnerships, as hereinafter more particularly stated, to restrain the trade and commerce in petroleum, commonly called crude oil, in refined oil and in the other products of petroleum among the several States and Territories of the United States and the District of Columbia, and with foreign nations, and to monopolize the said commerce."

A *conspiracy not originated by and continued* and controlled by these seven individual appellants is not the one charged in the petition. The answer denies such a conspiracy.

Stated in the form of a question, the issue is:

Does the proof show that these seven individual appellants, the two Rockefellers, Archbold, Payne, Flagler, Pratt and Rogers, at the time when this petition was filed, controlled the Standard Oil Company of New Jersey which has been termed the "Holding Company," and through the Standard Oil Company of New Jersey, *controlled* all the other corporations, partnerships and limited partnerships named in the petition, and by means of them restrained interstate trade, and created a monopoly in that trade in oil contrary to the provisions of the Sherman Act?

The question primarily involves:

(1) Do the seven individual appellants *control* these partnerships and corporations?

(2) Do these seven thus controlling use these partnerships and corporations to restrain interstate trade in and a monopoly of such trade in oil?

Finding of the Court Below.

"* * * * Evidence in this case too voluminous for recitation or review has convinced that prior to 1879 these seven defendants combined to secure and obtained the control of companies competing in interstate commerce in oil and suppressed their competition, that they caused the formation and execution of the trusts of 1879 and 1882; that they directed and followed that unique method of distributing the stock held in the latter trust by which it was not distributed to the majority of the stockholders for many years after 1892, while they and their associates held the control of it and of the corporations it commanded; that they caused the stockholding trust of 1899 and that by means of that trust they still hold the actual control and direction of the Standard Company and of its subsidiary corporations and that since 1899 they have been and still are engaged in carrying into effect and executing that trust." (Rec. A, p. 577).

We call special attention to the fact that the court has not found any conspiracy on the part of the seven to *unlawfully* restrict interstate trade or gain a monopoly. The Court did not find that we had done any of the unlawful things charged in the petition and denied in the answer. The Court did not find that this combination prior to 1879 was a violation of the Sherman Act or forbidden by any federal law. Its finding is that the seven

"combined to secure and obtained the control of companies competing in interstate commerce in oil and suppressed their competition."

But that did not necessarily, and unlawfully, directly, immediately and substantially restrict that trade. The suppression of competition was *after*, not *before* the competing

refinery was purchased and became part of the whole group and *then* that condition of entering into and becoming one of a non-competitive group necessarily ended competition. Private traders may lawfully combine by joint ownership to eliminate a competitor, annex him as one of themselves and thus suppress his competition, but they cannot do this by unlawful means. If by *lawful* means it is neither technically nor substantially unlawful restraint of interstate trade.

We early call attention to the fact that the Court has not found fraud or force or unlawful acts on part of appellants.

THE COURT ERRED IN THIS FINDING OF FACT—

Evidence in the case as to the interests of the seven individual appellants and their control of the Standard Oil Company of New Jersey.

The evidence in the case shows that the seven individuals do not own at the present time, and did not own at the time when the bill was filed in this case, a majority of the stock of the Standard Oil Company of New Jersey, or anything like a majority.

The appellants' Exhibit No. 1 (Vol. 18, p. 1) gives a list of all the stockholders of the Standard Oil Company of New Jersey on August 19th, 1907. From this we find that there have been issued 983,383 shares of stock, and that the seven individual appellants own the following number of shares each:

John D. Archbold (p. 3),	6,000	shares;
H. M. Flagler (p. 29),	30,500	"
O. H. Payne (p. 63),	40,000	"
Charles M. Pratt (p. 66),	5,000	"
H. H. Rogers (p. 71),	16,020	"
John D. Rockefeller (p. 71),	247,692	"

William Rockefeller (p. 71),	11,700	"
Total,	356,912	"

This gives to the seven individual appellants between 36% and 37% of the total shares issued by the Standard Oil Company of New Jersey.

It is also shown by the evidence that the seven individual appellants constituted a minority on the Board of Directors of the Standard Oil Company of New Jersey.

Petitioner's Exhibit No. 8, offered in evidence by the Government itself (see Vol. 7, p. 53), gives the directors and officers of the Standard Oil Company of New Jersey and of the sub-companies for the year 1907. This Exhibit shows the following directors of the Standard Oil Company of New Jersey (see Vol. 7, page 78):

John D. Rockefeller,	Charles M. Pratt,
William Rockefeller,	E. T. Bedford,
H. M. Flagler,	Walter Jennings,
John D. Archbold,	James A. Moffett,
H. H. Rogers,	C. W. Harkness,
Wesley H. Tilford,	Col. Oliver H. Payne,
Frank Q. Barstow,	John D. Rockefeller, Jr.,

A. C. Bedford.

The above list comprises fifteen directors in all, of which the seven individuals constitute a minority, the board standing seven to eight against them.

It must not be forgotten that Mr. John D. Rockefeller had not for years prior to 1906 been in active touch with the business.

See Vol. 16, pages 3183, 3192, 3202, 3225.

On page 3182 Mr. Rockefeller testified:

" * * * I have been out of this business for the last fifteen years."

II.

THE COURT BELOW ERRED IN HOLDING THAT THE TRANSFER IN 1899 TO THE STANDARD OIL COMPANY OF NEW JERSEY BY THE THEN OWNERS, PRIVATE TRADERS IN PETROLEUM AND ITS PRODUCTS, OF THEIR TITLES TO VARIOUS NON-COMPETITIVE REFINERIES, PIPE LINES, RESERVOIRS, TRADING STATIONS, TANK CARS, AND OTHER PROPERTIES, JOINTLY USED BY THEM AS ONE PROPERTY IN THE PRIVATE TRADING BUSINESS OF THE ACQUISITION, TRANSPORTATION, MANUFACTURE AND SALE OF OIL, WAS OF ITSELF, AND REGARDLESS OF ANY ACT PRIOR TO 1899, OR SUBSEQUENT THERETO, A RESTRICTION OF INTERSTATE TRADE AND AN ATTEMPT TO MONOPOLIZE, BY UNLAWFUL MEANS, SUCH INTERSTATE TRADE, AND A VIOLATION OF THE SHERMAN ACT.

We submit:

(a) The Sherman Act permits trusts, combines, corporations and individuals to enter into and compete for interstate trade so long as they act lawfully, and the act does not seek to regulate the method in which the properties which make the articles that enter into interstate trade shall be held; nor does it forbid those

who enter into the trade from doing their business in the form of a trust or corporation or combine.

The method or form in which they carry on business was immaterial, provided they carried it on *lawfully*.

(b) The Court below eliminated from the case, (for the purpose of its opinion), all the charges in the petition of fraud, force or unlawful conduct on the part of appellants. It also held that to constitute a crime under the Sherman Act the restriction of interstate trade must be direct, immediate, necessary and material. It did not pretend that the appellants in transferring their properties to the Standard Oil Co. had any intent to restrict or monopolize interstate trade (except as inferred from the transfer itself).

(c) It is quite certain that the Standard Oil Co. of New Jersey after 1899 *might* legitimately and properly compete for interstate trade. Undoubtedly the combination of the group of properties gave it a great power in so competing, but equally undoubtedly the combination after 1899 might lawfully compete for the interstate trade and foreign transportation, provided it did not restrain such trade or by unlawful means seek to gain a monopoly contrary to the provisions of the Sherman Act.

(d) There is nothing in this case to show, and the court did not pretend, that after 1899 the combination did unlawfully compete; did unlawfully restrict interstate trade; did by unlawful means seek to monopolize the interstate trade; yet, such proof was indispens-

able to prove that the combination was, in 1906, when the bill was filed, violating the Sherman Act.

See the Calumet and Hecla cases:
Judge Knappen, 167 Fed. Rpt., 709, 715.
Judge Lurton, 167 Fed. Rpt., 727, 728.

In disregard of the foregoing the Court below did find against appellants, and we turn to the opinion to find out why and to ask,

What did the court decide?

What were the reasons given for the decision?

Can the decision below be maintained?

What Did the Court Decide?

The Court below puts its decision solely on the grounds of the conveyance of 1899 to the New Jersey Standard Oil Company. This and only this, the Court said, was a violation of the Sherman Act under the decision in the Northern Securities Case.

The Court therefore *assumed* that prior to 1899 and in 1899 the 5,000 owners of the jointly held properties partly evidenced by stocks directly held in the subsidiary companies and largely by trust certificates, were the lawful owners of a large group of then non-competing properties, used in the oil business, and that in 1899 they were not, in so holding and in operating their plants, violating the Sherman Act.

Section 1 of the decree distinctly finds that the conspiracy to restrain trade began *"since the year 1890,"* not *before* 1890, but *after* it.

We, in another part of this brief, *discuss the position of these owners prior to and in* 1899, *and the validity of the Trust Agreement of* 1882; but now as we are solely concerned with the Opinion of the Court below, and that Court ignored all acts prior to 1899 and assumed their validity, we have to do likewise to be fair to that Court.

The Court below explicitly and directly decided this case on the authority of the Northern Securities Case (193 U. S., 197), and held that the former ruled the latter.

That the Court did so treat this case, look at the following:

The Court said (Rec., Vol. A, p. 577):

"The acts of these and other defendants prior to July 2, 1890, did not violate the anti-trust act of that year because it was not then in existence. Whether or not their transactions constituted a violation of the common law is a question much discussed which it is *unnecessary* to determine in this case. * * * *

"Laying out of view the acts of the defendants prior to July 2, 1890, except as evidence of their purposes and of their continuing conduct and its effects, *does the stockholding trust of* 1899 and its continuing operation constitute an illegal restraint of interstate or international commerce in violation of the Anti-trust Act of 1890?"

The Court again said (Rec. Vol. A, p. 585):

"* * * the questions whether or not the charges in the bill that other unlawful means were or are employed

are true, and whether or not the power of the Court to prevent the existence or continuance of a monopoly is limited to the prohibition of the use of illegal means and their like have become moot and it is unnecessary to express any opinion upon them."

(Rec. Vol. A, p. 579), the court considered the Northern Securities Company case, 193 U. S., stating what it was and asserting that a—

"group of stock-holders * * * subsequently transferred their controlling interest in the stock of each of these companies to the Northern Securities Company in exchange for its stock, and the Supreme Court decided that this transaction constituted a combination in restraint of commerce among the states and affirmed a decree of this court which enjoined the continuance of its operation. The defendants and their associates acquired the control of a majority of the stock of more than thirty corporations many of which were potentially and naturally competitive, prevented their competition by means of this ownership, and then by the transfer of the stock of nineteen of them to the principal company in exchange for its stock placed in that company the control and management of all of them. If it was a violation of the anti-trust act to combine the control of competitive corporations in a third in the case of the Northern Securities Company, why was it not as much of a violation of it to combine the control of ten or twenty or thirty of these corporations in one of their number in the case in hand?"

Again (Rec. Vol. A, p. 581):

"It is true that railway corporations owe duties to the public which do not rest upon trading, manufacturing and private transportation companies, such as the duty to operate continually their railroads and the

duty to carry persons and property presented for transportation at reasonable rates, but the power of Congress to regulate interstate and foreign commerce and the exertion of that power manifested in the anti-trust act embrace all persons and corporations engaged in such commerce, as is amply illustrated in the various applications of the act which have been made in the several decisions here cited. The mischief against which that law was levelled is not less threatening from a vast combination of private corporations owning and using in interstate and foreign commerce property worth hundreds of millions of dollars than from a combination of two railway companies. The act makes no distinction between them, it excepts neither class and where Congress has made no exception it is not the province of the courts to do so. No countervailing reason overcomes these considerations and the vesting of the majority of the stock of many potentially competitive private corporations engaged in interstate commerce in a holding company which would be violative of the anti-trust act if made by the stockholders of railway companies of that character must be subject to the condemnation of that statute."

Again (Rec. Vol. A, p. 582):

"Counsel argue with persuasive force that the transfer of the stock of the nineteen corporations to the principal company wrought no substantial restriction of competition because the owners of that stock had and exercised the same power of restraint before that transfer that was vested in the Standard Oil Company of New Jersey thereafter. But the power of the principal company after the transfer of 1899 to fix the prices at which the thirty corporations should buy and sell the articles in which they dealt, the terms of their purchases and sales, their rates for the transportation of oil and

its products and all the infinite details of their vast operations in which they might compete and thereby to prevent their competition was greater, more easily and quickly exercised and hence more effective than it would have been in the hands of 3,000 scattered stockholders. The trust deed of 1879, the trust agreement of 1882, the withholding of the separate certificates of shares of stock in each corporation from the holders of the trust certificates in the dissolution of that trust until they took their shares in all of the corporations, bear convincing testimony to the soundness of this proposition. The combination formed by that transfer and its power to restrict competition were less liable to be destroyed, more reliable and permanent than those springing from the joint ownership by three thousand stockholders of each corporation. There is much more probability that corporations potentially competitive will separate and compete when each of their stockholders has a separate certificate of his shares of stock in each corporation which he is free to sell than when a majority of the stock of each of the corporations is held by a single corporation which has the power to vote the stock and to operate them. And although the group of stockholders led by Mr. Hill and Mr. Morgan had the same power to prevent competition between the two railway companies that the stockholders of these corporations had to prevent competition between them, the Supreme Court held in the case of the Northern Securities Company that their transfer of their stock to the holding company granted to that corporation a power so much greater and more effective than that held by the stockholders of the railway companies that the necessary effect of it was a restriction of competition so direct and substantial that it made it an illegal combination in restraint of interstate commerce.

"Because the power to restrict competition in interstate commerce granted to the Standard Oil Company of New Jersey by the transfer to it of the stock of the nineteen companies and of the authority to manage and operate them and the other corporations which they controlled was the absolute power to prevent competition among any of these corporations, because this power was greater, more easily exercised, more effective and more durable than that which the three thousand stockholders of these corporations previously had, because many of these corporations were potentially competitive and were engaged in interstate commerce and the necessary effect of the transfer of the stock of the nineteen companies to the holding company was, under the decision in the case of the Northern Securities Company, a direct and substantial restriction of that commerce, that transfer and the operation of the companies under it constituted a combination or conspiracy in restraint of interstate and international commerce in violation of the anti-trust act of July 2, 1890."

Judge Hook in his concurring opinion said (Rec. A, p. 857).

"The principal conclusions upon which we are all agreed may be briefly stated as follows: A holding company owning the stocks of other concerns whose commercial activities, if free and independent of a common control, would naturally bring them into competition with each other is a form of trust or combination prohibited by section 1 of the Sherman anti-trust act. The Standard Oil Company of New Jersey is such a holding company. The defendants, who are in the combination, are enjoined from continuing it and from forming another like it."

In the decree Section 1 the Court charge that the conspiracy began not in 1870 or 1882 or prior to 1890--but "since the year 1890"—

The words are:

"* * * that since the year 1890 the defendants named in Section 2 of this decree have entered into and are carrying out a combination or conspiracy in pursuance whereof about the year 1899 * * *"—

The court then considers *only* the stockholding trust of 1899 and what it did. It ignores and thereby assumes the validity of the trust of 1882. That trust was ended in 1899, and now the Court turns to the new one of 1899. That this new one is invalid under the Sherman Act, the Court says, was ruled by this Court in the Northern Securities Case, and quite an argument follows to prove this. Then the Court sums up its conclusion in this language:

> "Because the power to restrict competition in interstate commerce granted to the Standard Oil Company of New Jersey by the transfer to it of the stock of the nineteen companies, and of the authority to manage and operate them and the other corporations which they controlled, was the absolute power to prevent competition among any of these corporations because this power was greater, more easily exercised, more effective, and more durable than that which the three thousand stockholders of these corporations previously had, because many of these corporations were potentially competitive and were engaged in interstate commerce, and the necessary effect of the transfer of the stock of the nineteen companies to the holding company was, under the decision in the case of the Northern Securities Company, a direct and substantial restriction of that commerce, *that transfer and the operation* of the companies under

it constituted a combination or conspiracy in restraint of interstate and international commerce, in violation of the Anti-trust Act of July 2, 1890." (A, p. 583).

WHAT WERE THE REASONS THE COURT GAVE FOR SUCH CONCLUSION?

Those reasons are briefly outlined in the above extract, but let us more closely examine the facts as found in the opinion below.

The Court briefly sketched the development of the Standard Oil Company beginning in 1865 with the firm of Rockefeller and Andrews, as the owner of a refinery in Cleveland, Ohio, down through the firm of Rockefeller, Andrews & Flagler, owning two refineries; the firm of William Rockefeller & Company owning another; the organization of the Standard Oil Company of Ohio in 1870, and the acquisition by it and through it between 1870 and 1879 of forty other refineries located in various places, during which period Mr. Rogers, Mr. Archbold, Mr. Payne and Mr. Pratt joined Rockefeller and Flagler in the oil business. On April 9, 1879, the stockholders of the Standard Oil Company of Ohio were the equitable and exclusive or majority owners—

"in the property and business of more than thirty companies engaged in the oil business." (Rec. A, p. 574).

On April 9, 1879, the legal and equitable title to all these properties was conveyed to Vilas, Keith and Chester—

"in trust to hold and manage them for, and to divide and distribute them among, the thirty-seven stockhold-

ers of the Standard Oil Company in proportion to their holdings of the stock of that company. (Rec. A, p. 574).

That these trustees managed these properties—
"and with their earnings purchased other property and the stock of other companies until, in 1882, they held in this trust property worth more than $55,000,000.00."

In 1882 the legal and equitable owners of all these properties—

"entered into a trust agreement to the effect that"
all said properties were conveyed to nine trustees during their lives, and the life of the survivor of them, and for twenty-one years thereafter, unless the trust was sooner dissolved by vote of the stockholders; and the Trustees were given power to vote stocks held by them and manage and operate the properties, and—

"buy with the trust funds"
bonds or stocks of other companies engaged in a like business, and divide among the *cestuis que trustent* the profits.

Six of the individual defendants in this case were among the trustees, and these trustees issued to their *cestuis que trustent* certificates of the par value in the aggregate of $97,250,000.00.

In March, 1892, the Supreme Court of Ohio enjoined the Standard Oil Company from further operating the trust because it violated the laws of Ohio and was beyond its corporate powers.

The details of the dissolution of the trust are then given with the assertion that—

"the individual defendants, however, and their more intimate associates * * * secured to themselves the

control and management of all the companies in that way until the year 1899."

The Standard Oil Company of New Jersey, organized in 1882, one of the constituent companies in the trust and itself owning and operating refineries called the Bayonne, at Bayonne, New Jersey, the Eagle Works, at Communipaw, New Jersey, the Camden Consolidated refinery at Parkersburg, West Virginia, and a refinery at Baltimore, Maryland, had its charter powers enlarged in 1899 to include holding of stocks in other companies, and its capital increased to $100,000,000, and the above described trust certificates and other properties were exchanged for the stock of the Standard Oil Company of New Jersey, which Company—

"succeeded to the legal title to the majority of the stock of the nineteen companies, and thereby to the management and control of those companies and of all the companies which they controlled." (Rec. A, p. 576).

From 1899 to the filing of the present Bill in 1906—

"the affairs of the principal company and of the subsidiary companies have been managed by the former as the business of a single person." (Rec. A, p. 576).

The par value of the capital stock of the underlying companies in 1899 was about $100,000,000.00; in 1903 more than $150,000,000. The New Jersey Company through its stock ownership is the owner of sixteen refineries, besides several directly owned by the said Company and used in refining illuminating oil and other products of petroleum; twelve (12) transportation companies, which owned in 1899 only 10,749 miles of gathering lines as compared with 45,227 in 1908; and

3,904 miles of trunk lines in 1899, as compared with 9,338 miles in 1908, capable of transporting oil from one state to another; and six marketing companies with 3,574 selling stations, and several producing companies.

The New Jersey Standard Oil Company, by itself and subsidiary companies, from 1899 to 1907 produced more than one-tenth (1-10) of the crude oil obtained in this Country; transported more than four-fifths (4-5) of the petroleum derived from the Pennsylvania and Indiana oil fields; manufactured more than three-fourths (3-4) of all the crude oil refined in this country; owned and operated one-half of all the tank cars; marketed more than four-fifths (4-5) of the illuminating oil sold; exported more than four-fifths (4-5) of all the illuminating oil sent forth from the United States; sold more than four-fifths (4-5) of the naphtha; and sold more than nine-tenths (9-10) of the lubricating oil sold to railroads.

The Court further stated that—

"by means of this trust (Standard Oil Co. of Jersey) and the commanding volume of the oil business which it acquired, thereby secured, and it has since exercised and is using, the power *to prevent competition between the companies it controls,* to fix for them the purchase price of the crude oil, the rates for its transportation, and the selling price of its products. It has prevented and is preventing any competition in interstate and international commerce in petroleum and its products *between its subsidiary companies and between those companies and itself.*" (Rec. A, pp. 576-577).

That the seven individual defendants—

> "caused the stockholding trust of 1899, and that by means of that trust *they* still hold the actual control and direction of the Standard Company and of its subsidiary corporations, and that since 1899 *they* have been and still are engaged in carrying into effect and executing that trust." (Rec. A, p. 577).

The Court then *eliminated* from its consideration the acts of the defendants *prior to July* 2, 1890, and whether those acts did or did not constitute a violation of the common law, reserving the right to consider such acts as evidence of a purpose in similar business transactions since that date. The Court eliminated *all* acts *prior* to July 2, 1890; not some, but *all.*

See Ante, page 21.

It is then plain that the Court did not decide this case on the ground that the Government in its petition and brief asked it to do—i. e.—that the Trust Agreement of 1882 was when made void as a restriction of competition as tending to a monopoly: that it was void under the Sherman Act, and, as the Standard Oil Co. in 1899 only succeeded to the properties of the Trustees, and as they did continue to carry on such business, they restricted competition: that the ap-

pellants did certain alleged illegal things there enumerated. The Court declined to do so, declined to find the facts so alleged in the petition. Was not that practically a denial of the position? It is expressly noticeable that the Court did not find that in the acquisition of our properties we used any illegal means—either fraud or deceit or intimidation. The Court did not find that the purpose of making the trust agreement of 1882 was to smother competition or gain a monopoly. Or that in the strife for interstate trade we used illegal means.

But the facts upon which the Court acted stated still more briefly, were:

On July 2, 1890, the nine trustees were the legal owners of all the properties of the Ohio Standard Oil Company, and other corporations and the *cestuis que trustent* were all the stockholders of that Standard Oil Company.

All this property was one entire whole, and operated as such; as if it were all owned by one person.

The combined legal and equitable titles made an indefeasible ownership. All this property was managed and controlled by the seven individual defendants in this case, acting through the nine trustees.

There was *no competition* between or among any of the properties. It was expressly and strictly a *non-competitive* group, and if at any time any parcel of the group had been in any kind of competition, that ceased before 1879, and since then competition never had existed. Such parcels of the group as were purchased prior to 1879, had been so changed and enlarged that it had become, by 1890, (certainly by 1899) to all intents and purposes, a new parcel. What kind of competition,

if any, had actually existed prior to 1879 between any one unit then purchased and the then group, whether reasonable or unreasonable, the Court does not find, regarding it as unimportant in the Court's view of the case. It did find that prior to 1879 we had acquired competing refineries, but how—of what importance—under what circumstances, it did not find. And it did not charge or find that our acquisition of any of those properties was by improper or unlawful methods or that it was illegal for us to acquire them.

The Vilas, Keith & Chester Trust of 1879 and the new trust of 1882 were not, the opinion assumed, legally objectionable, or at least dismissed as immaterial, the Court, in its view of the case, treating them, at least for the purposes of the opinion, as methods of holding property, which were not objectionable under the Federal law prior to July 2, 1890, or indeed under the common law.

The increase after 1879 in the properties held in 1879, both in numbers and values, was largely by use of the earnings of those properties in improving those already held and purchasing like properties, and all this increase was by the persons who owned them in 1879. The Court said:

> "It is true with negligible exceptions that the stockholders of the defendant corporations were the joint equitable owners of them from 1879 or from their subsequent organizations respectively until July 1, 1899." (Rec. A, p. 580).

The owners of these properties, acting through the Trustees, used the earnings of their property to purchase other properties and enlarge and improve their own. (Rec. A, p. 574).

And the Court recognized it was dealing with the rights of the seven individual appellants: they were the ones charged in the Bill. The corporations, including the Standard Oil Company of New Jersey, were merely the pawns in the game which the seven used. The question always is the rights of the seven and their associates, and not the corporate power or rights of corporations. The separate rights of the corporations that the seven used in this case under these pleadings were negligible.

The Court started on July 2, 1890, with a prosperous enterprise which had begun in 1865 in a small way in a new and unique and unprecedented production, which by the unceasing labor, skill and enterprise of seven extraordinary men, and the re-investment of its earnings and use of great capital had, in the course of twenty-five years, developed into one of the great successes of modern times, and *lawfully so* developed.

What was it then the seven individual appellants and their associates did after July 2, 1890, which brought them under the condemnation of the Sherman Act?

Nothing but the conveyance of these properties in 1899 to the Standard Oil Company of New Jersey, and taking in lieu thereof stock in that New Jersey corporation.

It was the seven individuals, the Court found, who did that:

"* * * they caused the *stockholdig* trust of 1899:"

"* * * they still hold the actual control and direction of the *Standard* Company:"

"* * * since 1899 they have been and still are engaged in carrying into effect and executing that trust."

It was the doing of that *and that alone* which brought upon the seven the maledictions of the Sherman Act.

See extracts from Opinion printed *ante* pages, 16 to 22.

Up to 1899 the properties under the trust of 1882 were handled and used by the seven, through the nine trustees, exactly as they were afterwards managed by the seven through the Standard Oil Company of New Jersey.

The properties were non-competitive before 1899 and under the trust, and they remained exactly as they were after 1899 under the Standard Oil Company of New Jersey.

If so, how did a change by the seven of the mere method of holding the properties, the management remaining as before, violate the Sherman Act?

The Corporation, the Standard Oil Company of New Jersey, did not confer upon the seven individuals any new and greater powers in the management of the properties than they, the seven, had under the trust of 1882, as it was claimed in the Northern Securities case that the charter of the Northern Securities Co. had conferred upon the prior owners of the stocks of the two competing railroads. The properties of the Standard Oil group after they were conveyed to the New Jersey corporation was equitably owned by exactly the same persons in the same proportions and held for the same uses and so used and with no added power, and were managed by the seven exactly the same as before.

Why then, was this transfer a violation of the Sherman Act?

The Court below said (Ante, pp. 17, 21), because this Court, in the Northern Securities Case, 193 U. S., 197, 321, 322, had so held.

Did or does the Northern Securities Case so hold?

Let us see:

(a) The Securities case involved two competitive railroad companies each of whom owed duties to the public to continue in operation, and to carry for all alike.

The present case involves only the rights of seven American citizens and their associates managing, through private trading corporations and associations, a private trading business in the production, refining, transportation and sale of oil. No one of these individuals or corporations owes any such duty to the public as the railroad company does. The traders may sell to one and refuse to sell to

another—may sell at one price to one and to another at a less or greater price: may wholly cease to do business.

There is hardly a case in this court touching such questions where these differences are not recognized and relied upon.

(b) When the control of the two railroads was conveyed to the Northern Securities Company, the railroads were then not only bound to compete, but they were in *active, actual competition.* Not only were they two parallel railroads under the law bound to compete with each other, but they were then *actually* competing. The conveyance of control of both to the Northern Securities Company gave that company the power to stifle the competition, and hence restrict interstate commerce. It was substantially the merger of the two railroads.

In the present case the properties of the seven individuals and their associates, the private trading corporations, were not, when conveyed in 1899 to the New Jersey Corporation, in com-

petition and really as they existed in 1899 never had been. Nor were they in 1899 bound to compete with each other. If any of them ever did to any extent compete with each other, it was prior to 1879, at which time, and even now under Federal Laws, one trading competing corporation might, and may lawfully buy another. All of these refineries *never did* compete with each other. If any did compete before 1879 with the other refineries owned in 1879, such refineries were not in existence in 1899. The old fashioned, much-used and antiquated works prior to 1879, had given way to much larger, newer constructions, long prior to 1899. The nature of the units that made up the group of itself largely prev nted competition. The pipe lines, trading stations, tank cars for refined oil, and reservoirs were not competitive and never had been.

(c) In the Securities Case the stocks in the two competing railroad companies were, prior to the assignment to the Securities Co., owned by distinct and independent bodies of men, who each acted independent of the other and had no interest in the other's property. These two groups never became one until their stocks were changed for stock of the Northern Securities Company whereby they did become one group.

In the present case before the transfer of 1899 all the stocks and properties were owned in common by all the stockholders, each one of the stockholders having an interest in every single parcel of property. There was only one group. There never had been but one since 1879. The transfer in 1899 did not change the group or the ownership. All remained as it was before the transfer.

(d) The thing the Government complained of in the Securities Case was that the power to control these two railroad companies was put by Morgan, Hill and others in the Securities Company, which Securities Company was organized by them under the law of New Jersey, for the express and, indeed, sole purpose of holding such stocks. They claimed to be able through and by this Corporation to lawfully acquire and lawfully own this control, which gave to the Securities Company the power to cripple interstate commerce, contrary to and in violation of the terms of the Sherman Act.

Messrs. Hill and Morgan and their associates knew they could not directly combine and themselves jointly hold the control of both railroads, each having a like interest in each. These two never did so jointly hold and never conspired to so hold except through the Securities Corporation. Their conspiracy was to put that control in the Securities Company, which they thought was a legal method of securing such control.

Thus Mr. Justice Harlan said on page 322 of the Securities case (193 U. S.) that Hill and Morgan and others—

> "entered into a combination to form under the laws of New Jersey a holding corporation with a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof * * *"

Thus the Securities Company gained a *new power* that Hill and Morgan did not pretend they had acquired, i. e., to smother competition between the railroads. They, as individuals, did not dare to put into their hands by a joint ownership of the railroad stocks such power because in *Pearsoll's Case,* 161 U. S. 646, this Court had already said such a combination giving such a power would be illegal. They sought a legal method of acquiring such power, and they thought the New Jersey Corporation was the right way.

The New Jersey corporation was organized by them as an essential and indispensable part of their scheme.

In the Securities case the Hill group and the Morgan group sought by their transfer to the Securities Company to gain a new power—one they never had before—the power to lawfully hold the power to smother competition in two competing railroads.

See how this entirely distinguishes that case from this.

In our case the properties after the combination were held exactly as before—save that the legal title before 1899 was held by the Trustees and after 1899 by the Corporation. No new group of owners or of properties was formed. No new or additional power was acquired by the transfer to the Standard Oil Company of New Jersey that did not exist before. Indeed the powers of the Trustees prior to 1899 were greater over the properties and business than the power of the Corporation after 1899.

The Standard Oil Company of New Jersey was organized in 1882—as a Manufacturing Corporation and not as a mere Holding Company. It acquired several refineries and in 1899 was engaged in a large manufacturing industry i. e. refined oil.

Its owners, also the owners of other properties, under the statutes of New Jersey so authorizing, enlarged its capital stock and conveyed to it their other properties as a convenient economic method of managing them.

(e) The idea of the Court below, unsupported by any evidence in the case, that *prior* to the conveyance to the Securities Company, Morgan and Hill had made a pool of the stocks in both railroads and thus jointly owned both, and each stockholder in interest in the stock of the two railroads, and that the two bodies had become one and competition had then ceased, is contradicted not only by what I have already cited, but by the following excerpts from the opinions of Justices Harlan, Brewer and White in the Securities case.

There was no completed union of the two bodies of stockholders until the conveyance to the securities Company. Justice Harlan (p. 322):

> "Thus as stated in Article VI of the bill, by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each * * * the holding corporation with not only the power but the duty to pursue a policy which would promote the interest, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems *was to be* removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

(p. 324):

> "In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies."

(p. 325):

The Securities Company was not organized in good faith, but as a mere method of perfecting the conspiracy.

By this scheme—

"the former stockholders of the Great Northern Railway Company have received, or would receive, and hold almost fifty-five per cent. of the Securities Co. stock., the balance going to the former stockholders of the Northern Pacific Railway Company."

(p. 326):

Justice Harlan delineated the scheme—

"of organizing a corporation under the laws of New Jersey which should hold the shares of the stock of the constituent companies, such shareholders in lieu of their shares in those companies to receive upon an agreed basis of value shares in the holding corporation."

(p. 335):

"What the Government particularly complains of, indeed all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies, which, in violation of the Act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee, designated to act for both companies in repressing free competition between them."

(pp. 333 to 347):

Justice Harlan combats the assertion that the Northern Securities Company, *as a stock corporation,* might lawfully

acquire and hold the control of the two competing railroads, which was the chief defense offered.

(pp. 349-350):

That New Jersey could not grant power to the Securities Company to restrict interstate commerce.

(p. 354):

All the stock the Securities Company acquired in the two railroad companies—

"was acquired and held to be used in suppressing competition between those companies. It came into existence *only* for that purpose."

We respectfully insist that an examination of Justice Harlan's opinion will demonstrate that the Court below unintentionally, but most decidedly, fell into error in its assertion above quoted.

(p. 362):

Justice Brewer said:

"There was a combination by several individuals separately owning stock in two competing companies, to place the control of both in a single corporation. The *purpose to combine*, and *by combination* destroy competition, existed before the organization of the corporation, the Securities Company."

It was part of the purpose to organize the Securities Company, and competition itself was to be and was destroyed only by conveying to the Securities Company—and not prior thereto.

(p. 365):

Justice White said that Hill and his friends owned control of the Great Northern, and Mr. Morgan and his friends of the Northern Pacific, and that under these circumstances—

"Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads."

(f) In the Securities Case the defense was *under* and *relying upon* the power of the charter of New Jersey to the Securities Company, which was organized solely and only for the purpose of securing such control of both railroads as would enable it to smother the existing competition. The question in that case was *the power* of the Securities Company *to accomplish such result*. Did it lawfully have that power? It was admitted that the status of each stockholder in each of the competing railroads was changed by the transfer to the Securities Company. He lost his direct ownership in his separate railroad, which he theretofore had, and became merely an owner of Securities stock. He became, through the Securities Company, interested in two railroads, as one, and the management and control of his former property was changed.

In the case at bar, the Standard Oil Company of New Jersey was a bona fide organization in 1882 to refine oil, and was in 1899 the owner of large refineries and doing a large business. As the Court below found, this Company was one part of the trust property of 1882-1899, which in 1899 was under the same control and management of the seven appellants as were all the other parcels of the trust group. All, including the New Jersey Standard Oil Company, were owned in common by the same persons and were not competing. Indeed, the New Jersey Corporation, (S. O. Co.) was organized in 1882 and never had competed with any other one of the group.

Now by conveying to the New Jersey Corporation these non-competing properties, the men who as one group owned them all, gained no additional power, and did not in the least change the status of the properties or the status of those who were owners of them prior to such conveyance. The properties were still held in trust for them with this change, that before the conveyance they had certificates of the Trustees, afterwards stock of the Standard Oil Company. But their real interests were not changed. They did not get by the transfer an interest in other property they did not have before, as did the Securities people. They did not get or attempt to get, or try to get, by the New Jersey Charter, a power to suppress competition, either lawfully or unlawfully. There was no competition to suppress, as between the jointly held properties. The seven appellants were just as fully in control of all these properties before 1899 as after 1899, and their power over all of it

was not added to or changed, unless lessened, by conveyance to the New Jersey Standard Oil Company.

In a word, the main and marked difference between the two cases is:

In the Securities Case the Securities Company did gain the power to smother then actually existing competition between two parallel and competing railroads, for which purpose alone it was organized and for which purpose the stocks were conveyed to it. The management of the separate railroads was changed. A new power was gained which was additional and other than the Morgan-Hill groups ever before owned.

As the Supreme Court of Washington, in the *State of Washington vs. Cascade Ry. Co.*, 51 Wash. 346, said of the Northern Securities Case:

"The ground upon which the decision rested was that the effect of the stock ownership by the Securities Co. would be to stifle *competition which had theretofore* existed between the two railroad companies."

In the case at bar the New Jersey Standard Oil Company did not gain any such power. There was no existing competition to smother. There was no effort or

purpose to give it that power. The management of the properties conveyed to it was not changed, but was under the same seven who had it before. The Trustees under the agreement of 1882 had larger powers than the Standard Oil Company of New Jersey in 1899 when conveyance was made to it.

It is a true and fair statement of the ruling of the Court below to say:

Seven men controlling for, say 5,000 people, 70 parcels of property, devoted to private business enterprise and for which the 5,000 held trust certificates of trustees, in 1899 determine that thereafter the 5,000 shall hold stock certificates of the New Jersey Standard Oil Company for the same properties in the same proportions and with the same power and management. Neither the 5,000 owners nor the seven managers gained any new power or property or changed their status or smothered competition by the change, but they did gain, as they think, an easier and more economical method of holding and managing the joint properties. They did not intend to nor did they manage the properties after 1899, except as they managed them before, and they had no idea of restricting competition between their jointly held properties, because there was none to restrict.

Yet the Court below held that the mere transfer itself:

(1) Was a violation of the Sherman Act passed to further and protect interstate commerce;

and

(2) That the Northern Securities Case was on all fours with the present case, and ruled it against appellants.

The error of the learned Court in so ruling is further demonstrated by other portions of its opinion.

Judge Sanborn's Opinion.

(1) His Honor overlooked the fact that in the Securities Case there were then and before that Company was organized and when the stocks were transferred to it, *two independent* competitive groups actually competing, one group having, with Hill, control of the Great Northern, and the other, with Morgan, having control of the Northern Pacific; but these groups never amalgamated or merged or became one group until *after* the conveyance to the Securities Company; and by that conveyance to the Securities Company the two groups amalgamated and became one, and thus virtually and to all practical effect the two parallel competing railroads were merged and became one, and competition between them was smothered.

Whereas, in the case at bar, all the properties conveyed to the New Jersey Standard Oil Company were non-competitive, were owned by only one group of men, and as a fact were not competing among themselves or any of

themselves and the Standard Oil Company of New Jersey and really never had competed. Competition was not smothered by that conveyance, as in the Securities Case. The conveyance to the New Jersey Standard Oil Company did not increase the power of the seven, who managed these properties, and certainly such conveyances did not create a new power to smother competition, as in the Securities case.

(2) The Court below does say that—

"Hill, Morgan and their associates acquired control of the two railway corporations long before they placed their stock in the Securities Company in 1901." (Rec. A, p. 580).

Pearsall vs. G. N. R. Co., 161 U. S. 646.

"Those companies were natural and potential competitors, but this group of stockholders held the power to prevent them from actively competing, and it is as incredible that they were actually doing so after they came under the control of that group as it is that the defendant corporations were engaged in actual competition in the nineties." (Rec. A, p. 580).

But here again the Court overlooks the plain facts in the Securities Case that there were two independent, unconnected and rival sets of actually competing stockholders: the one group owning control of the Great Northern and the other of the Northern Pacific Railway. These two groups were not one as the Court below assumed. They were pronouncedly two. True if the two had united in

action, they could jointly have suppressed competition. But they never did unite in one group or in action until they organized the Securities Company and conveyed the stock of both competing railways to that Company. The two groups existed and the active competition existed between the two railways, and the power given the Securities Company was the power to smother an *actually existing* competition, not one that had been in existence, but had ceased. There is no evidence in the case that such competition had ceased, and this Court found directly to the contrary.

On page 320 of the opinion of this Court by Justice Harlan in the Securities case (193 U. S.) he finds:

That the Great Northern Company and the Northern Pacific Company owned and operated *separate* lines of railway which ran across the continent and—

"were and are parallel and *competing* lines;"

"and the two companies *were engaged in active competition for freight and passenger traffic.*"

With that competition existing and in active operation, and for the very purpose of eliminating it and gaining the lawful right to do so, the Securities Company was formed, as hereinbefore stated. If any one doubts this, *please* read the whole of Justice Harlan's opinion.

Take page 326, in speaking of the effect of the Securities Company, he says:

"Necessarily also the constituent companies ceased under such a combination to be in active competition for trade and commerce along their respective lines, and have become practically one powerful consolidated corporation, the principal, if not the sole object of the formation of

which was to carry out the purposes of the original combination, *under which* competition between the constituent companies *would cease.*"

Not that it had already ceased, but that it "*would cease.*"

Again on page 362 he says:

"There was a combination by several individuals *separately* owning stock in two *competing* railroad companies to place the control of both in a single corporation."

(3) Judge Sanborn says that some of the properties owned by the Appellants were—

"potentially and naturally competitive:"

"were natural and potential competitors:"

and their competition was prevented by their being jointly owned by the same persons, and therefore he concludes they must be treated as if they were *actually* competing, and in the decree made it is sought to make such properties actually compete with each other.

Potential Competition.

We submit that the idea of competition between properties all owned by the same persons is a novelty. The idea that properties themselves compete and that if one man owns two or more he must compete with himself is startling. Competition between joint owners is also novel.

"The law does not and did not require that these parties should compete in the purchase of product."

Fairbanks vs. Leary, 40 Wisconsin, 642, 643.

It is with great respect we urge that a constructive crime under a highly penal statute is a novelty, and if it is applied, as it was in the Court below, it widens the scope of the Sher-

man Act and lessens the scope of the private tradesmen to an unexpected extent and seems inconsistent with *Whitwell vs. Continental Tobacco Co.* (125 Fed., 454).

Competition is the striving of two or more persons, or corporations, either individually or jointly, for one thing, i. e., trade; it is personal action; the strife between different persons. Properties do not compete. Their relative locations may more readily enable their owners to use them in competition, but of themselves and as against each other, they do not compete.

The Court below then meant that, assuming certain refineries were so located that they might be used, i. e., their product might, in the race for the trade, be used in competition, if one and the same group of persons owned two or more of such refineries, this of itself violated the Sherman Act—is a restraint of trade and tends to monopoly,—because if owned by two or more independent groups, each group would compete with each other group.

This idea makes the Sherman Act read that the same person or group of individuals shall not own and operate two or more sites for refineries or for stores or any kind of manufactories which might be used by different owners in competitive strife.

See this Court in the *Trans Missouri* case, 166 U. S., 321, cited *infra* (p. 55).

Closely looked at, it would be simply incredible that the Sherman Act could be so construed, or that any Government would so shackle and restrict trade. Read the Sherman Act and these results inevitably follow.

The words "potential" or "naturally competitive" are not in the Sherman Act. It says nothing of *potential competition or natural competition.*

(a) It is plainly not within the letter of the Sherman Act. If it is to be added, Congress must do it, not the Courts.

(b) It is not within the spirit of the Act, for the spirit of the act is to further and increase trade, while such a doctrine would lessen and restrict it

(c) The man who violates the Sherman Act is a criminal. If the merchant or manufacturer or trader owning one store or manufactory or plant wishes for his increasing trade to increase his facilities in the production or handling of his goods, see how this rule cripples him. He may not buy the adjoining lot for it undoubtedly is—

"potentially and naturally competitive."

The natural place which would suit him would be one where he could use or operate it jointly and in connection with his other places. But this new rule forbids that. It would be folly for him not to select a new site which would accommodate the trade he had; yet under this rule he could not, for some rival of his, for the same trade, could use such site to compete.

If he does hazard it and selects a new site, which a jury might think suitable for a rival location, he is a criminal and liable to fine and imprisonment, besides punitive penalties and the restrictive powers of a Court of Chancery.

And this under a statute which was passed to further and increase trade.

(d) When we recollect that this rule only refers to the ownership of properties, and the Sherman Act only covers interstate commerce, the wonder grows.

That the Court below thought that the mere ownership of properties by *one* which, if owned by *two might* compete, violates the Sherman Act clearly appears from the language used in the opinion, Vol. A, pp. 578, 579:

> "The principal company and many of the subsidiary corporations were then, and still are, engaged in interstate and international commerce, many of them were *capable* of competing with each other in that trade, and *would have been actively competing if they had been owned by different individuals, or different groups of individuals.*"

A case inconsistent with the lower court's theory of "potential competition" is

State of Washington ex rel. Cascade Railway Co. vs. Superior Court, 51 Wash. 346, 98 Pac. 739 (1909).

The Great Northern and Northern Pacific railroad companies operated competing lines between Seattle and Spokane, Washington, and each desired to build an extension from Spokane to Portland, Oregon. Instead of building separate competing lines, they organized and each subscribed for half the stock and contributed half the capital of a new railway corporation which constructed the desired extension.

The Supreme Court of Washington held that this corporation jointly controlled was not in violation of the Sherman Act, saying:

> "It is difficult to understand how transportation facilities can be impaired when two existing separate and independent corporations, each of which continues its individual identity, organization and control, subscribe for the capital stock of a newly created corporation and thereby aid in building a railroad which opens and serves additional territory. It would appear that the creation of the new corporation, instead of curtailing the transportation facilities already enjoyed by the public, would increase the same."

That court distinguished the Northern Securities case because—

> "The ground upon which the decision rested was that the effect of the stock ownership by the Securities Company would be to stifle *competition which had theretofore existed* between the two railroad companies."

But the ownership of properties is wholly under the laws of the state. Congress cannot and does not pretend to regulate their acquisition.

Yet this rule would broaden the Sherman Act so that a federal law regulates land titles in the state.

The Securities Case (193 U. S.) does not justify it. There the effort was to merge two parallel and actually competing railroads whereby the competition between them for interstate traffic would be smothered and trade restricted.

This new rule would forbid both the competing raidroads from acquiring adjacent land to widen the road-bed of each, or acquire additional facilities to increase its business, because perhaps some independent corporation would buy that land and build an opposing and competing railroad.

(e) This new rule of the Court below assumes:

(1) That a rival trader will buy:

(2) That he will build a refinery and operate it:

(3) That he will make the kind of product that the other man does:

(4) That he will use that product to compete with the other man for the same trade.

Need I comment?

Was ever such a crime before conceived of?

The Sherman Act is a highly penal one. In a criminal prosecution under the Act the degree of proof is beyond a reasonable doubt.

In a civil suit under it, the degree is not so great but the proof must be direct, plain and convincing.

The Sherman Act is a Criminal Statute.

United States vs. Freight Association, 58 Fed., 77, Sanborn, J.:

> "The Anti-Trust Act is a criminal statute."

Northern Securities Co. vs. United States, 193 U. S., 197, 401, Holmes, J.:—

> "The *statute* of which we have to find the meaning *is a criminal statute.* The two sections on which the Government relies both *make certain acts crimes.* That is their immediate purpose and that is what they say. It is vain to insist that this is not *a criminal proceeding.* The words cannot be read one way in a suit which is to end in fine and imprisonment, and *another way in one which seeks an injunction.*"

In considering the degree of proof, the Supreme Court of Missouri said in *State vs. Continental Tobacco Co.,* 177 Missouri, page 1:

> "However, it must be remembered that this proceeding partakes of the nature of a criminal prosecution, severe penalties are imposed; hence, it is not sufficient to warrant a finding adverse to respondents, that we may entertain strong suspicions, or even strong probabilities of their guilt. Such conclusions should only be reached upon a clear showing of the testimony, fully satisfying the minds of the Court that they were guilty of the violations of the law as charged in the information."

(f) Again Judge Sanborn says, speaking of the Securities Case and the case at bar:

> "For some time, therefore, before the transfer in each of these cases, a group of stockholders controlling a majority of the stock of *potentially competitive* corporations, which they vested in the holding company so that the latter had the power to operate them together without competition, and the rule which governs one must control the other." (Rec. A, p. 580).

Here again is the fundamental mistake which he makes:

(1) He says the two cases are identical because before the transfer to the Securities Company there was no *actual* competition between the two railroads.

As we have shown, this is a plain mistake. Such active competition did exist, and as we have shown *ante,* it was to smother this that the Securities Company was formed.

(2) He says the two railroads were owned by the one group of men, just like all the Trust properties of Standard Oil were owned, which was that each individual of the group had a like interest in both railroads.

This we have shown *ante* is directly contrary to the facts.

(3) He overlooks this plain distinction between the two cases: Even if it had been true (which it was not) that active competition had ceased between the railroads, yet they were parallel lines, and the law of their being compelled them to compete. It was unlawful for their owners not to compete. They were quasi public corporations bound to compete.

In our case we are individuals owning private trading corporations. We are not bound to compete. It is lawful for one to own forty refineries and not compete.

(g) Judge Sanborn says comparing the two competitive railroads in the Securities case with the different refineries in the Standard Oil case that:

"The act makes no distinction between them, it excepts neither class and where Congress has made no exception it is not the province of the Court to do so. No countervailing reason overcomes these considerations and the vesting of the majority of the stock of many potentially competitive private corporations engaged in interstate commerce in a holding company, which would be a violation of the Antl-trust Act if made by the stockholders of railway companies of that character must be subject to the condemnation of that statute."

With profound respect for the learning of the Judge of the court below, we do not comprehend how, under the cases and consistent with the principles which must govern, he can say that there is no distinction between competing railroads and private trading corporations. Each class, he asserts, is alike under the Sherman Act. One rule is applicable alike to each. But the authorities are directly to the contrary.

In the *Trans-Missouri Case,* 166 U. S., 321, Mr. Justice Peckham considered the difference between a public corporation, such as railroad companies, and private corporations, which are really trading companies, and on pages 320, 321 he, *inter alia,* said:

"The trader or manufacturer, on the other hand, carries on an entirely private business and can sell to whom he pleases; he may charge different prices for the

same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do business whenever his choice lies in that direction; while, on the contrary, a railroad company must transport all persons and property that come to it, and must do so at the same price for the same service, and the prices must be reasonable, and it cannot, at its will, discontinue its business."

Again on page 324 he said:

"It is entirely appropriate generally to subject corporations or persons engaged in trade or manufacturing to different rules from those applicable to railroads in their transportation business."

Again on page 333 the learned Justice said, speaking of the railroad corporations and the business of such corporations:

"It is of such a public nature that it may well be doubted, to say the least, whether any contract which imposes any restraint upon its business would not be prejudicial to the public interests."

Again on page 333 the Court said:

"It was said in *Gibbs vs. Baltimore Gas Company,* 130 U. S., 396, at page 408, by Mr. Chief Justice Fuller as follows: 'The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. * * *. Hence, while it

is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of a contract, (*Printing & Registering Co. vs. Sampson,* L. R. 19 Eq., 462), yet in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy."

Mr. Justice Harlan in the *Securities Case* (193 U. S., 353) said:

"Railroad companies, we said in the Trans-Missouri Freight Association Case, 'are instruments of commerce, and their business is commerce itself;' and such companies, it must be remembered, operate 'public highways established primarily for the convenience of the people, and *therefore* are subject to governmental control and regulation.'"

But the Court below says the Sherman Act does not in words make any distinction between railroad corporations and private trading partnerships or corporations and *therefore* both must be treated alike.

The answers are many:

(a) This Court, as above authorities show, have decided to the contrary.

(b) The Sherman Act is general. It does embrace all persons, all corporations, all combinations. But it was passed only to prevent any person, any corporation, any combination, from restricting or monopolizing interstate trade. Now different acts by different persons or corporations will effect com-

petition in interstate trade. But the same act if done by two independent groups will not necessarily effect competition under the Sherman Act.

Private traders may buy competitive plants and this does not, the law says, *per se*, and of itself restrain trade and tend to monopoly. *Yet*, if one competitive parallel railroad buys another this of itself and *per se* is illegal, because it does restrain trade and tends to monopoly.

(c) A broad general statute as the Sherman Act does not go into detail and by the use of appropriate words lay down a special rule for each case. It recognizes the complex business life of the day and also recognizes the existence of other laws, common law and statutory law, and this new statute fits into and becomes one in the complex whole. Especially a statute like the Sherman Act does not disintegrate society or strike down other laws which bear upon the same question. Such a statute, for example, does not pretend to say to two competing railroads, You can unite, or to two competing private traders, You cannot. It does not say that that which the other laws say is legal, has become illegal; that that which the other laws say does or does not constitute a monopoly or restriction of competition, is now no longer true, but that after the Sherman Act all acts done by all classes of persons have one and the same significance. It does not repeal, but assimilates itself with and becomes a part of the general mass of common law and statutory law.

United States vs. Sarges, 144 U. S., 311

"This statute, like all acts of Congress, and even the Constitution itself, is to be read in the light of the common law, from which our system of jurisprudence is derived. * * * as aids, therefore, in its interpretation, *we naturally turn to the decisions in England.*"

(d) But the Court in our case regards the group only at the time (1899) of transfer. Then the whole group was non-competitive. In the Securities case the two railroad groups were competitive and competing.

But notice further:

Who are the real appellants in this case who are charged with restricting competition?

Why, seven individuals, each of whom is a citizen of the United States. Each has inalienable rights which are superior to any corporate rights.

The right of each of the seven to compete in interstate trade by all legitimate methods antedates the constitution which C. J. Marshall said (9 Wheaton, 211) recognized and gave power to Congress to regulate.

Mr. Justice Brewer said in the *Securities case* (supra (362):

"A corporation, while by fiction of law recognized for some purposes as a person, and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person."

Yet the Court below, after expressly avowing that these seven were the real defendants and it was their acts which the bill denounced, apparently forgets that and their rights and treats them as if they claimed only corporate rights.

The learned Justice says as to the Securities Case (supra):

> "* * * no question of the mere acquisition or method of holding or of disposing of the title to property was there or is here in issue, that *the question* there was *as it is here*, whether a *certain method* of holding the stocks which control several corporations may be used to prevent competition between them in interstate and international trade."

We confess to a difficulty as to the real meaning—
It is first definitely stated that "no question of the mere acquisition or method of holding * * * property was there or is here in issue"—

And yet right on its heels comes this
"that the question there was as it is here whether a *certain method of holding the stocks* which control several corporations may *be used* to prevent competition between them in interstate and international trade."

But *all* methods of holding properties may be used to prevent competition.

Does the Court here merely mean that *some* methods of holding titles are *more* readily used to control competition,

than others, and that therefore the Sherman Act does forbid certain methods of holding properties and carrying on business? If so what words in the Sherman Act say so and how can one determine what difference in degree will constitute the offence under the Sherman Act?

If one *method* of holding enables the owners to compete a *little more* easily than the other, will that be the crime, or will it require a greater degree of ease? And who shall determine it?

Method of Holding.

No matter how held or what the manner of holding, if, as a fact, the owners use them in preventing competition, and without the stocks competition could not be prevented, and with them it could and is prevented, and is prevented merely by the holding of the stocks as it was in the Securities Case; then such holding violates the Sherman Act because it gives the power to do what is unlawful, as in the Securities case, smother active competition then being carried on between two parallel and competing railroads, and prevent the two railroads from competing in the future, as it was their duty to do.

The idea this excerpt seems to imply, that the mere method of holding the stocks was *itself,* and aside from the power to stifle competition, a violation of the Sherman Act, is a new reading of that much-abused and much-construed act.

His Honor not only implies, but he assumes, at least for the case, that the control of the seven through the Trustees under the agreement of 1882 of all this property was not

a violation of the Sherman Act, but, and only but, and only because, all such properties were conveyed to the Standard Oil Company of New Jersey, *that* and only *that*, and *of itself*, is a violation of the Sherman Act.

In plain language he so decides. The words he uses are:

> "* * * *THAT* transfer (1899) and the operation of the companies under it constituted a combination or conspiracy in restraint of interstate and international commerce, in violation of the Anti-Trust Act of July 2, 1890."

And he says that this was the question in the Securities Case. It was what the Government complained of in that case.

But here again His Honor seems to ignore what this Court said the complaint of the Government was. On page 335 Mr. Justice Harlan said:

> "What the Government particularly complains of, indeed all it complains of here, is the existence of a combination among the *stockholders* of *competing* railroad companies which, in violation of the Act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them. *Independently of any question of the mere ownership of stock* or *of the organization of the State corporation*, can it in reason be said that such a combination is not embraced by the very terms of the anti-trust act."

The charge of the Government in its Bill in the Securities Case was stated by Mr. Justice Harlan in that case (p. 322) in this way:

> "Thus as stated in Article VI of the bill 'by making the stockholders of each system jointly interested in both systems and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to-wit, the holding corporation, with not only the powers but the duty to pursue a policy which would promote the interests not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established.'"

And notice too, the error of the Court below as to the position of the individuals who assigned to the *Securities Company,* and what each got in return, as compared with the case at bar:

In the Securities case the individuals were separate owners in either the Great Northern or the Northern Pacific Railways, but not, with rare exceptions, owners in both. He assigned, for example, one hundred (100) shares of Northern Pacific, and the Securities Company gave him, say, one hundred (100) shares of its own capital stock, but the sole property of the Securities Company was the capital stock of *both the Great Northern and the Northern Pacific,* so that when the assignments to it (the Securities Company) of all the stocks in each of these railways were completed, and it had issued in lieu thereof to the stockholders who thus assigned its (Securities

Company) own stock, each of the old holders of stock in the Northern Pacific and the Great Northern became interested in *both* the Northern Pacific and Great Northern. The majority of the stockholders of the Securities Company controlled both the old railroads. Their management was changed.

In the case at bar, the holders of trust certificates under the Agreement of 1882 hold an interest jointly in all the properties of the Trust. If the holder had, after 1892, helped to dissolve the Trust, he had received an assignment of a proportional interest in each one of all these properties, i. e., the stocks of each. But in truth, whichever way he held the interest was jointly with all the other owners. All were interested in each property. All the properties were managed and controlled by the seven defendants.

Now what change was there after the assignment to the Standard Oil Company of New Jersey?

Just this:

Each still had the *identical* interest which he had before the assignment. The sole change was that *before* the assignment he held trustees' certificates or assignments, and *after* the assignment, stock certificates in the Standard Oil Company of New Jersey. He gained no additional interest in any other property, and especially competing properties, by the assignment, as did the stockholders in the Securities Case.

The management of all the properties was not changed as it was in the Securities Case, but the seven, the Court below held, remained in control *after* such assignment as *be-*

fore. The stockholders of the Standard Oil Company of New Jersey had no other powers whatever, except what they had *before* the assignment, while in the Securities Case each of the separate stockholders in each of the railroads got a new interest in the other railroad, and a majority of the stockholders in the Securities Company, a power they never before had, to control competition and to act together as one body with one interest, and not two bodies with distinct interests.

Why did the Court below think the mere transfer to the Standard Oil Company of New Jersey, as made *of itself* and *by itself,* a violation of the Sherman Act?

Its reasons we give in its own words:

"But the power of the principal company, after the transfer in 1899, to fix the prices at which the thirty corporations should buy and sell the articles in which they dealt, the terms of their purchases and sales, their rates for the transportation of oil and its products, and all the infinite details of their vast operations in which they might compete, and thereby to prevent their competition, was greater, more easily and quickly exercised, and hence more effective than it could have been in the hands of 3,000 scattered stockholders. The trust deed of 1879, the Trust Agreement of 1882, the withholding of the separate certificates of shares of stock in each corporation from the holders of the trust certificates in the dissolution of that trust until they took their shares in all of the corporations, bear convincing testimony to the

soundness of this proposition. The combination formed by that transfer and its power to restrict competition were less liable to be destroyed, more reliable and permanent than those springing from the joint ownership by three thousand stockholders of each corporation." (Rec. A, p. 582).

The Court below then did not claim that the assignment to the Standard Oil Company gave that Company any new or additional power to stifle competition than it had before, for it said:

> "Counsel argue with persuasive force that the transfer of the stock in the nineteen corporations to the principal company wrought no substantial restriction of competition because the owners of that stock had and exercised the same power of restraint before that transfer that was vested in the Standard Oil Company of New Jersey thereafter." (Rec. A, p. 582).

Then follows the previous quotation.

Now here is the new test as to whether a business comes under the Sherman Act. It merely depends on how it is organized.

Take any large private business, whatever its organization as a trust or partnership. It desires to re-organize to more economically and easily handle its business, but it does not give to the new re-organization any additional power it did not before have, or change the persons who own it and its properties, or change its management. Yet, if by this new re-organization, it could the more easily and quickly fix prices and the terms of purchase and sale, the rates for transportation of its products, and all the infinite details of its vast operation in which it might compete and thereby prevent competition, it is, the Court below says, a violation of

the Sherman Act, not because it prevents competition by outsiders, but merely competition between the jointly held properties.

Why?

Because its power is

(a) less liable to be destroyed.

(b) more reliable and permanent than it was before.

The power is the same after as before the transfer. It is exactly the same power, *but* it has become more permanent and reliable, and *this* violates the Sherman Act.

The words of the Court in the foregoing excerpt

"in which they might compete and thereby to prevent competition,"

refer solely to the business of the organization which it would be possible for its owners to split up and have the parts compete with each other. This the joint owners are not bound to do. Each individual may own all the refineries which his industry, his skill or his capital enables him to acquire. He may join others with him in such acquisition and ownership, and if he has *lawfully* acquired he may lawfully own and use. The number of plants he owns is immaterial if he or they lawfully acquired them.

But how could the parts compete with each other—each part is owned by the same individuals and in the same proportions—If they competed it would be with themselves which is evidently absurd.

Assume, as the Court below did, that our acquisitions up to 1899 were lawful, and before the transfer we lawfully owned them, there was no obligation on the part of the owners to compete with each other before or after the transfer.

The Court said:

Your joint ownership of so many plants gives the power to stifle competition.

But our answer is in the words of the Court below:

> " * * * monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law and may not be forbidden by the courts." (Rec. A, p. 585).

As was shown in *Whitwell vs. The Tobacco Co.*, (125 Fed. 454), by the same learned judge, if the power was lawfully acquired in a private trading enterprise, the Sherman Act does not condemn it.

If the magnitude of our acquisitions gives certain power, it only gives power rightfully acquired. Certainly the Sherman Act does not put limits to the acquisition of wealth.

Judge Hook in the Court below said:

> "Magnitude of business does not alone constitute a monopoly, nor effort at magnitude an attempt to monopolize." (Rec. A, p. 589).

Because and *only* because by the change we could, the Court said:

(a) more readily and easily fix prices;
(b) and the terms of purchase and sale of their products;
(c) and the rates for the transportation of oil;
(d) and the infinite details of our business:

we had committed the crime of violating the Sherman Act.

This brought us under the Sherman Act, though before that we were not under it.

But the Sherman Act says nothing about the methods in which one may carry on business. So far as that Act is concerned all methods are lawful *provided* the one selected is not used for the purpose of violating the Sherman Act.

Because

(e) the conveyance to the Standard Oil Company rendered our organization more stable and permanent;
(f) and it was less likely that the business would continue as one under the old agreement of 1882 than under the new agreement of 1899;

we had walked out of safety and most unknowingly to ourselves, had violated the Sherman Act, and had become criminals.

If this be so the Sherman Act *controls the methods* in which individuals or corporations must hold properties in the state if they want to do interstate commerce.

We always supposed Congress had naught to do with that, and that this Court had expressly so ruled:

Fuller, C. J., said in the *Knight Case,* 156 U. S., 16, that Congress did not attempt by the Sherman Act to

> "*assert* the *power* to deal with *monopoly* directly as such, or to limit and restrict the rights of corporations created by the States or the citizens of the State in the acquisition, control or disposition of property * * * *or to make criminal the* acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted."

Northern Securities Co. vs. United States, 193 U. S., 197, 346, Harlan, J.:

> "The Federal Court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, not prohibit from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company."

Kidd vs. Pearson, 128 U. S., 1.

Now how, seven individuals hold their real and personal property, depends solely on State laws. The United States has no power over that. Whether these seven see fit to hold it as tenants in common or joint tenants or as partnership property or under a limited partnership or under a corporate organization, is solely and only for the State to

determine. No one of these methods more than another looks toward or does tend to interfere with or restrict interstate commerce. Certainly the change, as in this case,, from nine trustees holding all the property to it being held by a corporation does not, of and *by itself,* restrict or tend to restrict interstate commerce, and especially so when the management of the seven continues as before.

Therefore and *necessarily* the mere fact of such change cannot be of itself an offense against the Sherman Act.

(g) The Court below had already held that the seven defendants were in management and control of the trust properties after the conveyance of 1899 as they were before. The words are:

"they still hold the actual control and direction of the Standard Company, and of its subsidiary corporations, and that since 1899 they have been and still are engaged in carrying into effect and executing that trust." (Rec. A, p. 577).

Well if so they arranged prices, etc., the same afterwards as before, they just as easily, just as readily, but perhaps a little more economically, arranged details afterwards as before.

But the plain answer to the whole proposition is:

(1) The Sherman Act does not pretend to dictate how one shall hold his real and personal property,

and if it did, directly collides with *Kidd vs. Pearson* (128 U. S. 1) *E. C. Knight & Company*, (156 U. S. 1) *and the Northern Securities Case.* (193 U. S. 197).

(2) The transfer of the property in 1899 to the New Jersey Standard Oil Company was not of itself an interference with or a restriction of interstate commerce, nor did it give to the Standard Oil Company a power to so restrict. It still left all the property under the control of the same seven who controlled it before, and as the Court below assumed that under the Trust Agreement of 1882 and such control of the seven it did not violate the Sherman Act, no more did it do so after the assignment.

(3) The Securities Case widely differs:

(a) There the Northern Securities Company gained a power which before that did not exist, i. e., it practically merged the two separate competing railroads into one, and thus had the power to stifle competition.

(b) Before the conveyance to the Securities Company, there were two independent, actually competing railroads owned separately by two independent competing groups, which by the conveyance to the Securities Company were united into one group.

(c) *Before* the conveyance, each individual of each group owned a certain interest in his one railroad, but *after* the conveyance he owned an interest in both of the railroads.

(d) *Before* the conveyance the interest of each stockholder in his own separate railroad led him to favor competition with the other railroad, whereas after the conveyance he had no such interest.

(e) *Before* the transfer each stockholder of, say, the Northern Pacific owned his shares as one in a body of, say, one thousand stockholders; *after* the transfer he was one of a body of, say, two thousand shareholders in a new and distinct corporation.

Thus the status of each railroad and each stockholder was radically changed.

Whereas in the case at bar:

Before the conveyance of 1899 to the New Jersey Standard Oil Company all the property conveyed to that Company was managed and controlled by the identical seven men with the same powers, who after the conveyance still controlled, just as before. They gained no additional power by the transfer. The Standard Oil Company gained no additional power that the Trustees did not have prior to that transfer. The individuals who through trust certificates *before* the transfer owned proportionately all the property, *after* the transfer, through stock of the Standard Oil Company, still owned the same property in the same proportions. No one gained an interest in any other property than that he had *before* the transfer.

Before the transfer the trust certificate holders numbered, say, 5,000, and *after* the transfer they still numbered the same.

Before the transfer the nine Trustees held and the seven defendants managed a group of non-competitive properties. Each certificate holder then owned and had a common interest in each one of the group. As such joint owners they were not bound to split up the one united group into dis-

tinct competitive groups. They might lawfully hold and operate the whole group as a unit. These certificate holders owned the one united group *after* the transfer as before. It was non-competitive *before* the transfer. It remained so *afterwards*. The owners of the one united group were not morally or legally bound to disintegrate the one united non-competitive group either before or after the transfer.

Thus the status of the owners and of the properties with whatever powers they had, was not changed by the transfer.

The Court below found that by this conveyance to the Standard Oil Company in 1899 the combination of 1879, 1882, 1899 was the more easily and readily enabled after 1899 to fix prices at which it would sell; to fix its rates of transportation and to arrange the infinite details of its enormous business. It became more stable and in a word better equipped for a competitive business life.

But this is hardly correct.

As to durability:

Under the Trust Agreement of 1882, the duration was for nine lives and twenty-one years at least, and probably, by new appointees, more.

As to stability:

According to the findings of the Court below, this identical business has been in charge and control of the seven individual defendants from 1879, and even after the assignment of 1899 to the New Jersey Standard Oil Company, that company was still under control of these seven appellants.

As to power:

The seven through the nine trustees had a greater power than did the Standard Oil Company of New Jersey.

But even if it was true this does not violate the Sherman Act. That Act was passed to enlarge and increase the fields of competition, to promote competition, increase trade. Only combinations which *restricted* competition are forbidden by the Sherman Act, and the fact of a trader preparing himself to do a larger business and to more effectively compete could hardly be seriously claimed to be a *restriction of competition.*

See the opinions of Judge Sanborn, in *Whitwell vs. The Tobacco Co.*, 125 Fed. Rep., 454, and *Phillips vs. Iola Portland Cement Co.*, 125 Fed., 593, 594, quoted at length on pp. 172 to 175.

In his opinion in this case the learned Judge reiterated these views. (See Rec. A, pp. 573-581).

But the Court below further said that after the conveyance in 1899, the seven, through the Standard Oil Company of New Jersey, prevented competition between the parcels of properties which made up one united group.

The Court admits the group itself was not objectionable; that the mere size of the group was not forbidden.

But because the separate items which composed the group were not made by their owners to compete with others of the group, this violated the Sherman Act.

The absence of competition inside the group was just the same before 1899 as after; *then* why does the Court hold one legal and the other illegal?

But were the owners of the group bound to split them up into competing groups? Where does the Sherman Act so provide? What case so rules?

If one man owned all of the group, he could not compete with himself.

As all the owners of the one group owned jointly all the group, how could they, by splitting up the group, compete with themselves now as owners of this group against themselves as owners of another group?

Need I elaborate?

According to the Court below, nothing brought us under the Sherman Act except the transfer of 1899 and the future operations under it.

Not only did the Court directly place its conclusions on acts done after 1890 (not *before* but *after*) and turn its back on and eliminated all acts prior to 1890, but in its decree it did this latter in a *most marked manner.*

The decree reads:

"That in and prior to the year 1899 there were twenty corporations organized respectively under the laws of various states engaged in commerce in petroleum and its products, either among the states or in the territories or with foreign nations, and these corporations held a majority of the stock and controlled the business and operations of many other corporations engaged in that commerce, that one of these corporations was the Standard Oil Company of New Jersey, hereafter called the Standard Company, which had a capital stock of $10,000,000, that since the year 1890 the defendants named in section two of this decree have

entered into and are carrying out a combination or conspiracy in pursuance whereof about the year 1899 they caused the capital stock of the Standard Company to be increased to $100,000,000.00, etc., etc. * * *; that this combination or conspiracy is a combination or conspiracy in restraint of trade and commerce in petroleum and its products among the several states in the territories and with foreign nations such as * * * the (Sherman Act) declares to be illegal."

The conclusion of Section 2 alleges the same combination is attempting to monopolize

"in violation of Section 2 of the Anti-trust Act."

Here in the most marked manner the Court finds that the conspiracy which contravenes the Sherman Act is one subsequent to 1890. It is not influenced or determined by any act done prior to 1890.

Are there other facts found in the opinion upon which a decree could be rested? The answer is No. The only thing that the Court has found which might look in that direction is the following:

The finding of fact by the Court other than contained in the decree starts with Mr. John D. Rockefeller owning the refinery in Cleveland in 1865, tracing his course in connection subsequently with others, and stating that Rogers, Archbold, Payne, and Pratt joined the Rockefellers and Flagler, and that they organized the Standard Oil Company of Ohio, and increased its capital stock to $3,500,000, and stating that the Standard Oil Company of Ohio had become the owners of—

"more than forty competitive refineries located respectively in Cleveland, Pittsburgh, Titusville, Parkers-

burg, Baltimore, Philadelphia, Bayonne, New York Harbor, Boston and other places, and the ownership of the entire interest or of a controlling interest in more than thirty companies."

In this finding the Court did not allege that these refineries were acquired in any other than a lawful business way. It did not pretend to allege that there was any conspiracy to defraud or conspiracy to cause a monopoly by which they were obtained.

Then comes the Vilas, Keith & Chester Trust of 1879, and the Trust of 1882, both of which are described, but no opinion is passed upon either by the Court below. The Court did not declare this to be unlawful. Then follows the recital of what happened after the decision of the Supreme Court of Ohio in 1892 and the manner of the dissolution of the Trust; and then the increase of the capital stock of the Standard Oil Company of New Jersey and the conveyance to it by the different parties in interest of the same properties that had been in the Trust of 1882.

In a brief way the assets and business of this Standard Oil Company of New Jersey are described, and then it is alleged that the Standard Oil Company of New Jersey

"is using the power to prevent competition between the companies it controls * * * between its subsidiary companies, and between those companies and itself."

It is not alleged that the Standard Oil Company has the power or is exercising it to prevent competition among outside companies, or with outside companies, or that it is using illegal means to acquire a monopoly of the trade. It finds the fact that the seven individual appellants—

"* * prior to 1879 * * * combined to secure and obtain the control of companies competing in in-

terstate commerce in oil, and suppress their competition, that they caused the formation and execution of the trusts of 1879 and 1882, that they directed and followed that unique method of distributing the stock held in the latter trust by which it was not distributed to the majority of the stockholders for many years after 1892, while they and their associates held the control of it and of the corporations it commanded, that they caused the stockholding trust of 1899, and that by means of that trust they still hold the actual control and direction of the Standard Oil Company and of its subsidiary corporations, and that since 1899 they have been and still are engaged in carrying into effect and executing that trust." Rec. A, 577).

It will here again be noticed that the Court did not find as against these appellants that they had been guilty of any fraud or unlawful conduct. The court did not use the word *conspire,* but only used the word *combine,* as to the co-operation prior to 1879. The combination prior to 1879 and even now of several private traders—

> "to secure and obtain the control of companies competing in interstate commerce in oil and suppress their competition,"

was and is perfectly legitimate and proper if it was done by *lawful means.* The Court does not find that it was done by *unlawful* means.

Webster defines combine:

> "To form a union—to agree—to coalesce."

He defines *conspiracy*:

> "A combination of men for evil purpose—an agreement between two or more persons to commit a crime in concert."

All the charges in the bill that this combination was fraudulent and that, through unlawful rebates and by unlawful control of railroads and by various and divers unlawful acts, it acjuired a control of these refineries, are disallowed by the Court. The Court does not find any such averments to be true. They were denied in the answer. They are not found in the opinion or decree below, and in this court the action of the Court below is conclusive because the Government saw fit not to appeal therefrom.

So if the position which we have hereinbefore argued be correct that the Court erred in holding that the transfer to the Standard Oil Company of New Jersey in 1899 was a violation of the Sherman Act, then there is nothing else in the findings of fact or in the decree of the Court which would justify a decree against the appellants.

III.

DECREE.

(I) THE COURT ERRED, FOR THE REASONS HEREINAFTER GIVEN, IN ENTERING THE DECREE IT DID.

(1) The decree authorized by the Sherman Act is one that merely enjoins—stops an illegal thing in operation when the petition is filed or which then is forseen.

It is wholly negative.

The fourth section of the Sherman Act gives the Federal Courts power *"to prevent and restrain violations of the act."* The only jurisdiction given is to stop something going on—something being done when the petition is filed.

That section reads:

> "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any

time make such temporary restraining order or prohibition as shall be deemed just in the premises."

Primarily *"to prevent"* means to hinder something that hereafter is to take place; the word *"restrain"* bears its own plain meaning of pulling back that which is in actual motion; which is then being done.

So when you say that a court may *prevent and restrain* you necessarily consider only and restrict yourself to the present and the future. You cannot either *prevent* or *restrain* a thing that was done twenty or one year ago; you can prevent and restrain that which is now in operation and continuing, but It is simply impossible to prevent and restrain that which has been done.

This Court said in *Lacassagne vs. Chapuis,* 144 U. S., 124:

"The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already."

Not only do these words *prevent* and *restrain* demonstrate this, but the same section adds that proceedings to enforce the Act may be by way of

"petition setting forth the case and praying that such violation shall be *enjoined* or otherwise prohibited;"

and then it adds that the courts may

"make such temporary restraining order or prohibition as shall be deemed just in the premises."

Twice the expression is "prevent and restrain;" then the word "enjoin;" then the phrase "restraining order" and the word "prohibited" and "prohibition." Each one of these can only mean to give jurisdiction over a present continuing or then foreseen violation of the Act.

Every word is prospective; not one retrospective.

Besides, the Act itself clearly shows two remedies given for the misdemeanor; the one is the ordinary criminal remedy to punish for what has been done, and the other is the extraordinary and unusual remedy of preventing and restraining the commission of a misdemeanor now in action and being done which is a violation of the Act.

In the *Knight & Company Case,* Fuller, C. J. (156 U. S. 17), said that the Sherman Act

> "only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the Act in respect of contracts, combinations or conspiracies in restraint of interstate or international trade or commerce."

Harriman vs. Northern Securities Company, 197 U. S. 244, 289, Fuller, C. J., quoted with approval the comment of Judge Thayer on the decree in the latter's opinion in 128 Fed. 808:

> "The decree was *wholly prohibitory.* It enjoined the doing of certain threatened acts. * * In its bill of complaint the United States prayed, among other things, for a *mandatory injunction* against the Securities Company, requiring it to recall and cancel the certificates of stock which it had used, and to *surrender the stock* of the two railway companies in exchange for which its stock had been issued. *This prayer for relief was denied.*"

Swift & Co. vs. United States, 196 U. S., 375, 402, Holmes, J., said the decree issued

> "*restrains* such combinations *only* to the extent of *certain specified devices* which the defendants are alleged to have used and intend to continue to use."

The Sherman Act prescribes certain specific methods of relief which are exclusive of all others.

Noyes on Intercorporate Relations (2nd Ed. of 1909) Sec. 406, says of the Sherman Act:

> "The statute, being *penal* in its nature, must be *strictly construed.* It imposes new liabilities and *provides particular modes of redress,* both for the public and the individual, and the methods so prescribed are exclusive."

Greer, Mills & Co. vs. Stoller, 77 Fed. 1, 3:

> "The statute, being highly penal in its character, must be strictly construed; and, having created a new offense, and imposed new liabilities, and having provided the modes of redress to the public and the private citizen, by established rules of construction, these remedies are exclusive of all others."

In *Minnesota vs. Northern Securities Co.* 194, U. S. 48, 71, Mr. Justice Harlan in holding that a state could not file a bill in equity under section four, said:

> "Congress has *prescribed a specific mode for preventing restraints* on it (interstate commerce.)"

Barnet vs. National Bank, 98 U. S., 555, 558.

"Where a statute creates a new right or offense, and provides a *specific remedy* or punishment, they alone apply. Such provisions are *exclusive*."

East Tennessee, etc. R. Co. vs. Southern Telegraph Co. 112 U. S., 306, 310.

"The remedy is statutory only, and every court which takes jurisdiction for its enforcement is limited *in its powers* by the statute under which alone it can act."

Farmers' & Mechanics' Nat. Bank vs. Dearing, 91 U. S., 29, 35.

"Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or remedy can be only that which the statute prescribes."

United States vs. Union Pacific Railroad Company, 98 U. S., 569.

An Act of Congress directed the Attorney-General to institute a suit in equity in the name of the United States against the Union Pacific Railroad Company, and all persons who had received stock in it without paying full value, or profits from construction contracts or bonds or lands, which should have been accounted for to the company. The purpose of the bill was for discovery, etc., and the restoration to the company of such moneys and property.

The Supreme Court sustained a demurrer to the bill on the ground, among others, that the relief asked was not within the terms of the act.

Mr. Justice Miller said that it was—
"clear that any bill brought by the Attorney-General under the fourth section of the act of 1873 must be *limited* by the provisions of that act, both as to the grievances on which it counts and the *relief* which it seeks."

Mr. Justice Miller further said:

"Congress might also have directed the Attorney-General, either as part of this proceeding or as an independent one, to ask the court to declare the franchises of the company forfeited. It might have ordered a bill to inquire if the company was insolvent, and if so, to wind up its affairs and distribute its assets. In short, there are many modes in which the legislature could have called into operation all the judicial powers known to the law. But it has not done so, and that is the constantly recurring answer to this bill. It provided in the statute for a mode of securing a full inquiry into the affairs of the company, by enacting that the Secretary of the Treasury should have free access to all its books and correspondence,—a mode of obtaining information far more effective than a bill of discovery. The statute, therefore, did not authorize a bill of discovery. * * * * * It limited the relief to be granted under this act, therefore, both by the terms in which it was granted and by other provisions, to the recovery of a moneyed decree, or a restoration of specific property to which the United States or the company was by law entitled."

The decrees that have been made under the Sherman Act.

In *Northern Securities Co. vs. United States,* 193 U. S., 197, 255, the Supreme Court affirmed the decree of the Circuit Court, which was as follows:

"That the Northern Securities Company, its officers, agents, servants and employes be and they are hereby *enjoined* from *acquiring* or attempting to acquire further stock of either of the aforesaid railway companies.

That the Northern Securities Company be *enjoined* from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein.

That the Northern Pacific Railway Company and the Great Northern Railway Company, their officers directors, servants and agents be and they are hereby respectively and collectively *enjoined* from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies.

And that they, together with their officers, directors, servants and agents, be likewise *enjoined* and specitively *restrained* from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railways companies which it now claims to own and hold.

And that the aforesaid railway companies, their officers, directors, servants and agents, be *enjoined* from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, the Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

In the majority opinion Mr. Justice Harlan said:

"The Federal Court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company."

From the report of *Harriman vs. Northern Securities Company*, 197 U. S., 244, 299, it appears that the directors of the Northern Securities Company voluntarily adopted a

resolution distributing the shares of the Northern Pacific and Great Northern ratably among its stockholders.

On page 289 Chief Justice Fuller quoted with approval the following comment of Judge Thayer on the decree in his opinion (128 Fed. 808), refusing the application of Harriman *et al.* for leave to intervene after the Supreme Court had affirmed the decree:

> *"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts.* * * * * * In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The Government was satisfied with the relief obtained, and expresses itself as fully satisfied therewith at the present time."

Swift & Company vs. United States, 196 U. S., 375.

The Supreme Court affirmed the decree of the Circuit Court, making perpetual a preliminary injunction. The injunction as modified by the Supreme Court, included combining to obtain rebates from common carriers, and was as follows:

> "1. And now, upon motion of the said attorney, the court doth order that the preliminary injunction heretofore awarded in this case, to restrain the said defendants, and each of them, their respective agents and attorneys, and all other persons acting in their behalf, or in behalf of either of them, or claiming so to act, from *entering into, taking part in, or performing any contract,* combination or conspiracy, the purpose or effect of which will be, as to trade and commerce in

fresh meats between the several States and Territories and the District of Columbia, *a restraint of trade,* in violation of the provisions of the act of Congress approved July 2nd, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' *either by directing* or requiring their respective agents *to refrain* from bidding against each other in the purchase of live stock; or collusively and by agreement to refrain from bidding against each other at the sales of live stock; or by combination, conspiracy or contract raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents; or by curtailing the quantity of such meats shipped to such markets and agents; or by establishing and maintaining rules for the giving of credit to dealers in such meats as charged in the bill, the effect of which rules will be to restrict competition; or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers as charged in the bill, the effect of which will be to restrict competition; or by any other *method or device,* the purpose and effect of which is to restrain commerce as aforesaid, and also from violating the provisions of the Act of Congress approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' by combining or conspiring together, or with each other and others, to monopolize or attempt to monopolize any part of trade and commerce in fresh meats among the several States and Territories and the District of Columbia, by demanding, obtaining, or, with or without the connivance of the officers or agents thereof, or of any of them, *receiving from railroad companies* or other common carriers transporting such fresh meats in such trade or commerce, either directly or by means of rebates, or by any

other device, transportation of or for such means, from the points of the preparation and production of the same from live stock or elsewhere, to the markets for the sale of the same to dealers and consumers in other States and Territories than those wherein the same are so prepared, or the District of Columbia, at less than the regular rates which may be established or in force on their several lines of transportation, under the provisions in that behalf of the laws of the said United States for the regulation of commerce, be and the same is hereby made perpetual."

The decree, as Mr. Justice Holmes said (p. 402), "restrains such combinations only to the extent of *certain specified devices,* which defendants are alleged to have used and intend to continue to use."

United States vs. Chesapeake & Ohio Fuel Co., 105 Fed. 93:

The defendants were the members of an association of coal producers, and a fuel company, who had made a contract by which the fuel company agreed to sell all the coal of the members of the association at prices to be fixed by a committee of the association, and to account to the association for the same. The decree was that the defendants

"* * * be *enjoined* from selling or shipping under this contract coal or coke into any state other than the state in which they reside, and the contract, in so far as it affects interstate trade and commerce, is declared to be void and illegal, and the combination of the defendants thereunder will be dissolved."

The decree was affirmed by the Circuit Court of Appeals in 115 Fed. 610.

New Haven Railroad Company vs. Interstate Commerce Commission, 200 U. S. 361, 404.

Interstate Commerce Commission filed a bill in equity alleging that the Chesapeake & Ohio Railway Company was purchasing and transporting and selling coal at a price per ton which, after deducting the cost of purchase and the cost of delivery, amounted to less than the published freight rate for coal.

The Supreme Court held that these acts amounted to an undue preference in violation of the Interstate Commerce Act. That Court, however, limited the injunction granted to the specific offense charged and the relief took the form of

> "perpetually enjoining the Chesapeake & Ohio from taking less than the rates fixed in its published tariff of freight rates, *by means of dealing in the purchase and sale of coal.*"

The Interstate Commerce Commission had taken a cross appeal in this case, claiming that the Court

> "should have further enjoined and restrained the Chesapeake and Ohio Railway Company from *giving to* said railroad company, or to *any other person,* firm, or company, *any undue or unreasonable advantage or preference,* and should further have restrained and enjoined the Chesapeake and Ohio Railway Company *from transporting coal from one State to or through any other State* for the New York, New Haven and Hartford Railroad Company, or for any firm, person or company, at a *less rate than the duly established freight rate* of the said railway company in force at the time, and from further failing to observe its published tariffs, or *from giving*

to the said New York, New Haven and Hartford Railroad Company, or to *any person, firm, or company,* in any manner whatsoever, *any undue or unreasonable preference or advantage.*"

The Supreme Court refused this form of decree, and, in its opinion, Mr. Justice White said:

"The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. *In other words, the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. Swift & Company vs. United States,* 196 U. S. 375. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *In re Debs,* 158 U. S. 564, was not open to such an objection, as its terms were

no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

The *Tobacco case* is now before and so recently argued in this court that it need not be cited at length. In that case for the first time under the Sherman Act, all participation in inter-state commerce was enjoined.

(2) The decree itself must be plain, defining exactly the things which the appellants are prohibited from doing.

The Supreme Court of the United States in *Swift & Company vs. United States*, 196 U. S., 375, 396, 402, in considering the decree of the court below in the above case, said:

"We equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. * * * So modified, it (the decree) restrains such combination *only to the extent of certain specified devices which the defendants are alleged to have used and intend to continue to use.*"

In the *Addyston Pipe Case*, 175 U. S. 247, the decree below was also modified and made more specific.

Lyon vs. Botchford, 25 Hun. (N. Y.), 57:

"It seems to us that the injunction order, at least in those two particulars, exceeded the office of an injunction, which should show upon its face all those things which it is necessary for the defendant to know in order to obey it, and should plainly indicate to the defendant specifically all the acts which he is thereby restrained from doing without calling upon him for inferences, or any conclusions only to be arrived at by a more or less uncertain process of reasoning, and about which the parties might well differ in opinion either as to the facts or law. The act prohibited must be the doing of some tangible or distinct thing, or series of things, to be clearly pointed out and described. * * * An injunction should in itself contain sufficient to apprise the party what he is restrained from doing without resorting to the bill on file. (*Sullivan vs. Judah,* 4 Paige, 444). Its language should be so clear that an unlearned man can understand it without employing counsel. (*Laurie vs. Laurie,* 9 Paige, 234; *Moat vs. Holbein,* 2 Edw., 188). It should be so expressed that defendants may distinctly understand what is prohibited. (*Clark vs. Clark,* 25 Barb., 76)."

Laurie vs. Laurie, 9 Paige, 234:

Chalcellor Walworth:

"As the defendant is bound to obey the process of the court at his peril, the language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning, without the necessity of employing counsel to advise him what he has a right to do to save him from subjecting himself to punishment for a breach of the injunction. And the

language of the writ should at the same time be so restricted as not to deprive him of any rights which the case made by the bill does not require that he should be restrained from exercising."

Robinson vs. Clapp, 65 Conn., 365, 396:

"The court also erred in granting an injunction in so indefinite terms. It is impossible to lay down any precise rule of universal application upon the subject But *the person enjoined is entitled to know with reasonable certainty what acts he may and may not do* without making himself liable as in contempt of an order."

Moat vs. Holbein, 2 Edw. Ch., 188:

Sullivan vs. Judah, 4 Paige, 444.

(3) The decree of the Court below in the case at bar.

See decree at length, Record, Vol. A, page 525.

The decree is in nine sections; Section 1 recited that prior to 1899 twenty corporations had been organized and engaged in commerce in petroleum, and further decreed that

"*Since the year 1890* the defendants named in Section two of this decree have entered into and are carrying out a combination or conspiracy in pursuance whereof about the year 1899 they caused the capital stock of the Standard Company to be increased to $100,000,000.00, caused a majority of the stock of the nineteen companies, and the power to control them, and to manage their trade, and the power to control the corporations which they controlled and to manage their trade, to be

vested in and held by the Standard Company in exchange for its stock which was issued to the former holders of the stock of the nineteen companies, and caused the Standard Company ever since to control all these corporations, hereafter called the subsidiary corporations, and to manage their trade without competition among themselves as the trade and business of a single person; * * *"

Such a combination is forbidden by the Sherman Act.

Section 2—

Names the conspiring defendants, and decrees that "by means of this combination the defendants named in this section have combined and conspired to monopolize, have monopolized and are continuing to monopolize a substantial part of the commerce among the states, in the territories and with foreign nations in violation of Section 2 of the Anti-Trust Act."

Section 3—

Names the defendants it eliminates from the decree.

Section 4—

Names the companies in which the Standard Oil Company of New Jersey owns the whole or part of the stock, and finds that the said Standard Oil Company

"controls the subsidiary companies and directs the management thereof so that none of the subsidiary companies competes with any other of those companies or with the Standard Company, but their trade is all managed as that of a single person."

Section 5—

"That the stocks of the various corporations which are named in Section 2 and described in Section 4 of this decree held by the Standard Company were acquired and are held by it by virtue of the illegal combination."

(a) That the Standard Oil Company and others

"are enjoined and prohibited from voting any of the stock in any of the subsidiary companies named in Section 2 of this decree"

and

"from exercising or attempting to exercise any control, direction, supervision or influence over the acts of these subsidiary companies by virtue of its holding of their stock."

The subsidiary companies are enjoined

(b) from paying any dividends to the Standard Oil Company on such stocks;

(c) from permitting the Standard Oil Company to vote stock in or direct the policy of or exercise any control over the corporate acts of such companies

"by virtue of such stock or by virtue of the power over such subsidiary corporation acquired by means of the illegal combination,"

But

"the defendants are not prohibited by this decree from distributing ratably to the stockholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination."

Section 6—

Defendants named in Section 2 are prohibited

"from continuing or carrying into further effect the combination adjudged illegal hereby,"

or

"from entering into or forming any like combination,"

Either

(1) by use of liquidating certificates

"in two or more potentially competitive parties to the illegal combination,"

or

by a conveyance of the physical property and business of any one or more of the defendants to

"a potentially competitive party to this combination,"

or

by placing control of any of said corporations in a trustee

"by causing its stock or property to be held by others than its equitable owners or by any similar device,"

or

(2) By making

"any express or implied agreement or arrangement together or one with another like that adjudged illegal hereby relating to

(a) the control or management of any of said corporations,

or

(b) "or the price or terms of purchase,"

or

"of sale"

or

"the rates of transportation of petroleum or its products"

or

"relative to the quantity thereof purchased, sold, transported or manufactured by any of said corporations *which will* have a like effect in restraint of commerce among the states, in the territories and with foreign nations to that of the combination, the operation of which is hereby enjoined."

Section 7—

Defendants are prohibited

"until the discontinuance of the operation of the illegal combination from engaging or continuing in commerce among the states or in the territories of the United States."

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(4) Purpose of decree.

We suppose the real purpose of the whole decree is to force a dissolution of what the court calls the combination: We are enjoined from continuing it, and are enjoined from doing any interstate trade until we do distribute the stocks.

Such distribution can only be to the stockholders of the Standard Oil Company, each his pro rata share of the stocks the Standard Oil Co. holds—but the method of distribution and the future use by the stockholder of his shares of the stock seems from the opinion of the Court to be to prevent two or more of such owners to agree with each other as to the

future use of the same—to prevent the owners of one refinery making any contract with another or a pipe line or trading station or tank cars as to the sale or quality or transportation rates or, indeed, about anything relating to petroleum.

If, say A, one stockholder is willing and offers to buy from B. C. D. their shares, the decree forbids it.

If A wants to get refineries from the others, he cannot.

No one of the stockholders of the Standard Oil Company seems able to do aught with the shares of stock the Standard Oil Company will transfer to him except to hold them or sell them to an outsider.

No one of the subsidiary corporations may contract with any other subsidiary corporation about the business of each, nor may it contract with any stockholder.

We know the scope of the injunction is limited to actions "which will have a *LIKE* effect"
to that of the present combination—but who can determine that in the complex business, such as that of the present organized Standard Oil Company.

Nature of Our Organization.

Our case has no analogy in decided cases—*The Joint Traffic, The Trans-Missouri, The Addyston Pipe case* were all cases where a number of *independent, unconnected* competing corporations by contract sought to make freight rates or

fix prices or regulate sales or production. Strike down the contract and each corporation thereby assumed the relation it had before the contract.

But in our case seven individuals, assisted by others, buy a portion of their properties, but build a much greater portion. They do all of this out of their joint funds and their joint enterprise. No one of their properties is or does compete with any other. All are jointly held and used and controlled as one property. There is no contract to fix prices or regulate production—or regulate rates for freight. The decree, if carried into effect, will not, as in the Addyston Pipe case and others, simply leave scores of old corporations where it found them, but will recreate new bodies, now parts of one whole, and now so used as to facilitate and carry out one united business.

This is elaborated *supra*.

(5) The Sherman Act does not give power to the Courts to strike down organized business—or destroy its property. If such had been its intention, adequate words would have been used to so indicate. It is not the continuance of business the courts may prevent, but solely and only

"violations of this Act."

If the facts show that the existing organization can legally continue without violating the Sherman Act, the court cannot destroy it, but only prevent it in the future doing unlawful acts. As, for example, seven (7) men by grouping 100 parcels of property, pipe lines, refineries, ships, etc., into one non-competitive group, own the group and may lawfully own it. Suppose they did not use the group to

make a product, but held it for sale for future rise in price; evidently the fact of the existence of that group does not *per se* violate the Sherman Act—because it takes no part in inter-state commerce. Evidently then it is the *use* of the group that creates that which goes into inter-state commerce, and not the ownership of it. But the handling of the group's product in interstate commerce may be legitimate or it may be illegitimate. The mere putting of the product itself openly and fairly in the market—putting it up as it were at auction, and selling it to the highest bidder in inter-state commerce, would not violate the Sherman Act. Therefore the group itself and the legitimate use of its product does not violate the Sherman Act. But if the owners of the group make a contract in restraint of trade or commerce between the states, *then* that contract is a violation of the Sherman Act, and its continuance will be restrained. But the organized group will not be stricken down, because of this violation. It is the *violation* which is at fault, and not the group.

So also, if the owners of the group, by unlawful means, exclude others from the inter-state trade, such exclusion is a violation of the Sherman Act, and will be restrained. But the organized group will not be stricken down.

Therefore in this case, if the owners of the organized group, by contract to restrain commerce through restricting competition, or by unlawful acts, exclude others from the inter-state trade, the continuance of both acts should be restrained, but the lawful group should not be destroyed.

Northern Securities Co. vs. United States, 193 U. S. 197, 346, Harlan, J.:

"The Federal Court may not have the power to forfeit the charter of the Securities Company; it may not

declare how its shares of stock may be transferred on its books, nor prohibit from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the state which created the company."

(6) Continuance at the time of filing the Bill is a condition precedent to the exercise of the Chancellor's power as to an act which began before the Bill was filed. If that act has ceased, an injunction would be useless.

It is also plain that as under the Bill and the Sherman Act equity jurisdiction is given by it only to merely restrain violations of the act then taking place or about to begin, it is immaterial whether the organized group was formed in part by acts themselves violations of the Sherman Act. The Federal Court is acting under a Federal Statute to restrain a continuing Federal crime. The acts the Federal Courts may restrain are violations of the Sherman Act—not violations of any supposed Federal common law. As the Sherman Act was not passed until 1890, acts prior to that date would not be violations of the Act. Therefore, it is useless to consider what the acts were prior to 1890, for they can throw no light on the present controversy. These alleged acts of railroad rebates, alleged unlawful exclusion of others (which we deny), were ended long prior to 1906 when this bill was filed. They were not then actually taking place. They were ended.

Evidently the Court below so thought for as we have seen, it declined to find these acts prior to 1890 were true or material, and thought it did find a conspiracy, this conspiracy the Court said began, not in 1870, as charged in the petition but after 1890.

Let me assume, for argument's sake (which I deny) that the Trust Agreement of 1882 was illegal at common law: that the present Standard Oil Company organization was by illegal acts prior to 1890 enabled to increase its size: that the same Standard Oil organization thus formed was in existence when the present bill was filed.

Would this authorize the Chancellor, by his decree, to strike down the present organization?

The answer is plainly No.

This bill is under the Sherman Act.

The court's jurisdiction is solely under that Act.

Congress might have broadened that Act to include all kinds of illegal trade combinations, and have broadened the powers of the court as to the relief granted—but it did not do so. It provided only for relief against the

"violations of this Act;"

and the things which are denounced by the act are only two:

(1) Contracts or combinations in restraint of trade:

(2) Attempts to monopolize by illegal means.

(7) Government's failure of proof.

In 1906, is there a particle of proof that there then existed and was being carried out any contract in restraint of trade? If so, what is it? On what page is the proof given?

In 1906, is there a particle of proof that by illegal means the present organization was *then* excluding any one from the inter-state trade? Please refer us to the page proving it.

If the reply be that the original organization formed prior to 1882 still continued, and this was in part enlarged by means illegal at common law, and the organization itself was also illegal at common law—and *therefore* the Sherman Act is violated—I answer:

But under the Sherman Act only *continued*
"violations of the Act"
set out in the Bill filed, give a court of equity jurisdiction, and these facts must show an existing continuing contract in restraint of trade or a present existing effort by illegal means to gain a monopoly of it. Illegal acts which were done prior to 1906 and which were ended prior to 1906 cannot be in 1906 continuing violations of the Act. The aggregation of properties is not of itself a violation of the Sherman Act if they are merely for private trading purposes. This may or may not be a violation of state laws, but the Sherman Act only concerns interstate commerce, and it is only the *use* of the product made on or in or by reason of the properties that goes into inter-state commerce. Now this product as it enters inter-state commerce may do so lawfully or unlawfully, but the mere fact that the men who made it had illegally or improperly acquired the properties on which it was made, does not *of itself* prove that in the bargaining, sale or transportation of the product in inter-state commerce, there necessarily was either a contract in restraint of trade or an attempt to monopolize. The existence alone of the aggregation does not prove a violation of the Sherman Act. There must be something more.

And so it was ruled in the Calumet and Hecla cases—cited *infro*, pages 109-110.

If it be true that the mere aggregation of properties was void at common law (which I deny) then I reply: But the Sherman Act does not so provide. It does not make the mere organization a violation of the Act, and if it did so provide, as such an organization was not of itself inter-state commerce, and only after its products went into inter-state commerce the commerce clause would attach, its constitutionality would be doubtful.

It recognizes as proper methods of holding properties and carrying on business, persons, combinations, corporations, and trusts.

If it be said, however, that the real question is the existence of the Power to restrain trade and monopolize it and not its actual exercise and that the Securities case ruled that the answer is:

(1) The Securities case involved two parallel and competing railroads, whose duty it was to compete and who could *not* unite. It was unlawful for them to so unite. Therefore, the placing the control of the two in possession of one person was practically to unite the two and thus violate the law.

(2) But it is lawful to purchase and group properties for private trading purposes, and one competitor may purchase the property of another. It is lawful to gain the *power* to restrain trade and monopolize trade if it is the result of lawful competition.

(3) Inter-state commerce is not concerned with the real estate which does not enter into interstate trade.

It is concerned solely with the product of it. The fact that the ownership of the group was illegally acquired does not of itself prove that the owners of it *have* or will exercise the power to restrain inter-state trade in oil or monopolize the same.

Calumet and Hecla Mining cases (167 Fed. Rpt., 704; 167 *Ibid,* 721—overruling 155 *Ibid,* 869). There the Calumet Co. obtained control of the Osceola Co. Considering the lawfulness of the power to control divers private trading corporations engaged in the same business, the Circuit Court said, after reviewing all the Supreme Court cases:

"* * * I find nothing in them sustaining the proposition that the direct, immediate and necessary effect of a control by a corporation over a competitor through stock ownership is to restrain trade or create a monopoly either in manufacturing or selling. * * * Beyond such indirect restraint as is incidental to a common management it is difficult to see that competition will be necessarily unlawfully restricted. It is true that an opportunity for restricting competition is afforded by the relation; but this is equally true of every case of a common general management. * * * In either of the cases presented further acts in addition to the mere forces of nature are required to bring about the restraint of competition beyond such restraint as indirectly, remotely and incidentally results from the relation of a common management * * * the authorities do not go to the extent of holding that in the absence of intent or of special features or conditions every case of control by a manufacturing or mining corporation over a competitor through stock ownership and consequent direction of corporate management creates *per se* directly, immediately and necessarily a restraint upon trade, and I am not prepared to hold that such is the effect."

The Circuit Court of Appeals 167 Fed. Rptr., 728, affirmed this view, Judge Lurton delivering the opinion:

> "But when the agreement or combination in question does not in its terms provide for the suppression of competition, or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an unlawful result, some evidence of an unlawful intent becomes essential, and the courts may say that if not stopped and prohibited, restraint is likely to be created. * * * The power of stock control which the Calumet Company has acquired may be exercised only in a legitimate and lawful way in the interests of an economical management of both companies. In that case it has done nothing directly affecting commerce among the states."

The Court below in this case so held. Judge Sanborn:

> "* * * monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law and may not be forbidden by the courts." (Rec. A., p. 585).

Judge Hook:

> "To offend the Act the monopoly must have been secured by methods contrary to the public policy, as expressed in the statutes or in the common law. * * * Congress did not intend to impede legitimate commercial activity nor put a limit to its fruits." (Rec. A, p. 589).

If the argument is, however, that the original combination of the seven (7) was to gain a monopoly, and such an

organization so combining and intending still continues and existed in 1906, and this constitutes a violation of the Sherman Act, I answer:

The Sherman Act expressly recognizes the existence and lawful operation in inter-state trade of combinations, trusts and corporations, and it is only when such combinations attempt to restrict trade that the Act denounces them—only when by unlawful means they attempt to monopolize, that they violate the Act.

Neither at common law nor under the Sherman Act was it or is it unlawful for seven (7) men to organize and by lawful competition and lawful means seek to monopolize interstate trade.

Whitwell vs. Tobacco Co., 125 Fed., 454.

As the court below in this case said (Rec. A, p. 585).

> " * * * and its true construction is that while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoinable under it, monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law and may not be forbidden by the courts."

If it is said that this position allows the combination to keep and use property it got by *unlawful means* the reply is, NO.

It only means that under this form of procedure that question is not before the Court.

There are adequate methods to punish such acts, but an equitable proceeding under the Sherman Act is not one of them.

All the Court decides is that Congress in its wisdom has not deemed it proper to give any other equitable relief than enjoining the *continuance* of the unlawfully restricting trade or monopoly of the same.

Objections to Decree.

It is too general—too vague—too indefinite—too broad. It includes business *within* a state as well as between states. Yet admittedly the Sherman Act only covers interstate commerce.

It seeks to regulate and control the ownership of and uses of private property in the hands of persons not parties to this Bill.

It denies to each individual defendant the right of holding his property as he chooses either by legal or by equitable title.

It denies him his right to buy what he may of all the physical properties the Standard Oil Company owns whether such be "potentially" competitive or not. (See opinions of Justices Brewer and Holmes in Northern Securities Company case, 193 U. S.)

It repeatedly, in speaking of a person (party) designates him as (Section 6)

"*potentially* competitive parties"
"potentially competitive party"
"potentially competitive parties"

without otherwise designating him.

It does not earmark the unit nor designate how one shall determine who are and who are not

"potentially competitive parties."

It enjoins the individual defendant from making

"any express or *implied* agreement or arrangement together or with one another * * * relative to the control or management of any of said corporations or the price or terms of purchase or of sale or the rates of transportation of petroleum or its products in inter-state or international commerce or relative to the quantities thereof purchased, sold, transported or manufactured by any of said corporations."

And while it adds a qualification "which will have a like effect" as the present combination, it does nothing to indicate how one can determine that and tell what would and what would not have a like effect, and without limitation of time, compels the individual to transact business under intolerable conditions.

As the evident purpose of the decree is to compel competition where none ever before existed, and if, as the opinion and decree seems to decide, each one of these companies, and each individual is a competitor of all the others, the result will be baffling.

Some of the situations—

(a) Here are say twenty companies each actually helping in producing refined oil—what alliance, if any, may each one of these forty have either with one or more of the refineries or one or more of the pipe lines, or one or more of the tank reservoirs?

(b) Here are eleven pipe line companies carrying oil. What contracts may any refinery or oil well or reservoir have with any one or more of them?

(c) What contract relations may each individual have with any one or more of the refineries—other pipe lines—tank lines or reservoirs?

And yet each corporation and individual must do business under threat of imprisonment of its managers if a move or a contract or sale or purchase be made which a Judge may think restricts commerce or tends to monopoly.

The decree seeks to and does, under Section 6, follow and control the use of the stocks of the individual stockholders in their hands in the sub-companies, and to hamper and restrict such stockholders in the use they shall make of them—to whom they shall be sold. No one of these individual persons

is a party to this Bill. They have never been heard or had an opportunity of being heard on the justness of such conclusion, and therefore as against each of them the decree is in that respect void.

Corporations parties to the Bill do represent their stockholders, but only within the scope of corporate power and control over such stockholders, but not as to the individual rights of the stockholder to do with his property as he chooses.

Brown vs. Pacific Mail Steamship Co., Fed. Cas. No. 2,025, 5 Blatch., 525:

A bill was filed against the Pacific Mail Steamship Company and certain of its stockholders to enjoin the voting of stock by the latter at an election of directors.

The Court sustained the bill, but refused to include in the injunction stockholders who had not been served with notice of the application for the injunction.

Judge Blatchford said:

> "* * * the words 'and all the other shareholders of the Pacific Mail Company,' which are in the prayer of the bill, must be stricken out from the injunction. I do not think I can enjoin the other shareholders without notice, or that service upon the Pacific Mail Company is to be considered, for the purpose of this second prayer, as service on such other shareholders."

Under constant threat of proceedings for contempt in the violation of such a broad, comprehensive, and yet vaguely worded decree (Section 6) that no one could in advance cer-

tainly foretell whether any given act was a violation—how could business be carried on.

It seeks to and does cover the future business operations of the defendants in petroleum and now adjudges, but in a vague and indefinite way, in advance of the facts, and the exact situation in the future, what things may be or may not then be done.

It does not, as the Sherman Act says it may, *after* and *upon* petition filed

"restrain violations of the Act"

but without a petition filed, and without a hearing as to any future act, it now condemns certain of them, but which ones no man can tell till the case comes to trial on proceedings for contempt.

(See remarks of Judge Hook in the court below). (Rec. A, p. 587).

The Sherman Act closely limits and defines the power of the court on a petition filed to give equitable relief.

Section 4 of that Act is printed (*ante*, page 82).

The things the Court may do are:

"to prevent and restrain violations of this Act"

"restrain such violations."

The petition must pray

"that such violations shall be enjoined or otherwise prohibited."

It is these VIOLATIONS of the Act that the court may enjoin, and only such *violations.*

But the court below enjoined all the defendants from

"engaging or continuing in commerce among the states" until a certain event.

The very purpose of the Sherman Act is to encourage and promote inter-state commerce, and to restrain one from engaging in it is a strange way of promoting it.

This portion of the decree is clearly not within the words of the Sherman Act.

Assume for argument's sake that the Standard Oil combination of 1899 is illegal (which we deny), yet the seven (7) individual appellants may in the future, as part of their constitutional rights, engage in inter-state commerce by themselves singly or jointly or with others. The Sherman Act does not impose the penalty that if one once violate the Act he forever or for a time loses his right to engage in inter-state commerce.

Where, then, does the court below find its authority to authorize it to enter such a decree, especially when that court recognized the doctrine of this court.

"Past unlawful competition does not deprive parties of their right to conduct lawful competition."

New Haven R. R. case, 200 U. S. 361, 404.

Undoubtedly a court in equity may and must shape its decree to suit the pending case, and hundreds of cases may be cited to so prove—but each of such decrees was suitable to the facts and the law as it then existed. But when Congress sees fit to pass a new statute creating a new offense which it designates as a crime and gives a new and limited jurisdiction to the Chancellor, and the Act itself defines the power of the court, is it not plain that the Chancellor is restricted in such cases to such named powers? As the Sherman Act says, the power of the court is to prohibit and enjoin

"violation of this Act."

Does not that define the court's power? The Act does not say "You can appoint a receiver for a trust," or "You can fine it or put in jail the guilty members." As the Act does not so say, is it possible the court can exercise such powers—merely because they would prove effective?

The very purpose of the Act was to make inter-state trade free, open, and encourage every one to enter it. But this decree prevents seven (7) citizens of the United States and their associates from doing so until some other thing done in the past has been effectively repented for, and works meet for such repentance have been done.

This, the Act never said a Chancellor could do.

This court never so held.

And with great respect it is asserted there is not a controlling analogy or authority that authorizes such a decree.

Effect of the Decree.

The seven (7) individual defendants and

Thirty-eight (38) corporate defendants are named in Section 2 of the decree as having formed a combination in restraint of inter-state trade. The corporations include eleven pipe line companies—fifteen refining companies—seven marketing companies—four producing companies, and one tank line company.

The decree carried out compels:

(1) Each one of these companies to stand single and alone and without any relation to another:

(2) Each one to compete with all the others:

(3) Each to refrain from either expressly or impliedly having any contract relation with each other in reference to

(a) The control or management of any of said corporations:

(b) Or the price or terms of purchase or of sale, or the rates of transportation of petroleum or its products in interstate commerce:

(c) Or the quantity thereof purchased, sold or transported or manufactured by any of them;

(d) And then adds

"which will have a like effect in restraint of commerce."

The effect of this decree is to take away from the individuals defendant and from the Standard Oil Company of New Jersey any and all joint control over the different subcompanies, and to prevent them from exercising that control

in any way whatsoever in the future, either by creating a new corporation or by agreeing or contracting together with one another in any way whatsoever with respect to such control.

In other words, the effect is to compel the different sub-companies named in the bill to stand alone, to act independently from all and each of the others, to compete with one another, and yet every one of such units will be owned by the same individuals and in the same proportions.

The inherent vice of this decree is that it seeks to create an artificial division which never existed before; it does not seek to compel members who were formerly independent to resume that independence, but it seeks to compel different sub-companies, which have never been independent, which have never been more than mere agencies created for certain purposes, to sever their allegiance with their principal, and to stand apart, independent and hostile to that principal and to each other.

In the cases heretofore where an injunction has been granted, the purpose of the injunction has always been *restorative;* the decree has always aimed to put things back into the place they occupied before and under like conditions as before the contract or combination distorted affairs and disturbed the course of inter-state trade; thus where A, B and C are each the owner of an independent competing business an injunction will restrain them from combining together to control prices or to divide up the territory between them or to in any way destroy competition, when this would affect the interstate trade, and an injunction restraining the combination merely puts them back where they were before, as separate independent competitors.

But the relief granted in the case at bar is wholly different from that. This is a case where seven individuals and their associates have been engaged in a common business, acting together for thirty-four years, with common interests, with common aims, and now having a great business built up by common effort, divided for convenience in operation into *numerous separate departments or agencies,* and practically all built by their own hands, acting not separately, but jointly. Now comes this decree which seeks to *split up this business into as many independent parts as the owners have seen fit to divide it into departments or agencies,* and to compel each of these departments or agencies to stand alone. The effect is not that men who have been operating independently heretofore shall continue to remain independent, *but that seven men and their associates who have been, as it were, in partnership for thirty-four years, shall dissolve that partnership;* not that competition shall be restored to its former condition, *but that a competition which never existed shall be created; in other words,* it is not sought to restore an old, but to create an entirely new status and new competition.

To cite some concrete examples of the things sought to be attained by the proceeding in this case:

(a) The seven individual appellants and their associate now own 54,616 miles of pipe line, and for ease of management have divided the whole into eleven different parts, putting each part under the control of a separate corporation, these all being named in Section 2 of the decree, as follows: Buckeye Pipe Line Company, Crescent Pipe Line Company, Cumberland Pipe Line Company, Eureka Pipe Line, Indiana Pipe Line Company, National Transit Company, New York Transit Company, Northern Pipe Line Company, Prairie Oil & Gas Company, Southern Pipe Line Company, Southwest Pennsylvania Pipe Line Company.

These companies jointly own 54,616 miles of pipe lines, of which the seven individual defendants and their associates built over 50,000 miles.

In these pipe lines the seven individuals and their associates have an investment of over $61,000,000.00.

All of these different lines are joined together into one compact, connected system and operated as a whole. With the insignificant exceptions already noted in another place, no one except the seven individuals and their associates were ever in any way interested in any of these pipe lines; the owners who built them divided up this complicated system into eleven different divisions and gave the control of each of these divisions to an *agency* created by themselves for the purpose of local supervision and control; *these agencies comprise the twelve pipe-line sub-companies. These local sub-companies were never independent, never did compete, never were anything but the agents of the seven individuals and their associates, the product of those individuals' joint creative labor.*

This decree splits up this pipe line system into eleven different parts, takes away from the owners, *who jointly built the pipe lines and who created the sub-companies,* all control over the different sub-companies, and compels the eleven different parts to stand alone, independently of their principal and of each other, to be hostile to and to compete with their principal and with one another.

(b) The seven individuals and their associates working jointly, have dotted the world with selling stations, costing from $1,000 to $20,000 each and upwards. In 1882 they had 130, most of which they built, some of which they bought; in 1908 they had 3,242, almost every one of which they built with their own hands.

They put these selling stations chiefly under the control of five marketing companies—the Standard Oil Company of New York, the Standard Oil Company of California, the Standard Oil Company of Kentucky, the Standard Oil Company of Indiana, and the Continental Oil Company.

Now by this decree, these companies must stand alone, *which they never did before*, must compete in the marketing business, *which they never did before, must* be hostile to their principal and to each other.

(c) The seven individuals and their associates operate at the present time about eighteen (18) refineries. John D. Rockefeller, Samuel Andrews and William Rockefeller originally built the one now operated in Cleveland about 1865; this refinery, immensely enlarged and very greatly improved, is now under the control of the Standard Oil Company of Ohio; the Solar Refining Company was created by the seven individual appellants and their associates in 1885, who constructed the refinery at Lima; the Standard Oil Company of Indiana was created in 1889 and built the great refinery at Whiting and one at Sugar Creek, Missouri; the Standard Oil Company of Kansas was created in 1892 and constructed the refinery at Neodesha; the seven individuals and their associates also built, through the agency of the Standard Oil Company of California, a great refinery near San Francisco in 1903, and one at Marcus Hook, New Jersey, in 1895, through the agency of the Atlantic Refining Company. Of the other refineries which they own, none of them has been purchased since 1882, and all those originally purchased have been vastly enlarged and improved; the one purchased in 1882 at $84,000.00 now being worth $1,450,000.00.

This decree takes away from the seven individuals and from the Standard Oil Company of New Jersey all control,

all supervision over these different refining companies, even over those which they themselves, working jointly, have absolutely created with their own joint means, and compels these refineries to stand alone, to be independent, to compete with one another.

(d) To facilitate the shipments of refined oil, gasoline, etc., over the railroads of the United States, the seven individuals and their associates have built over 10,000 tank cars for their own use, and today have them on every railroad on the continent. For the purposes of efficient control and management they put all these tank cars in charge of a sub-agent, the Union Tank Line Company. The company, its property, its business, its capital, are all and absolutely the work of the seven individuals and their associates, and these tank cars are valuable only as they are used with the entire plant, and especially refineries. And now, perforce, this corporation is cut away, must stand alone, cannot be controlled in any sense, manner or form by its founders and owners; must itself, the creature, compete with, fight against its creator.

(e) Along with their other developments, the Standard interests have created a great foreign trade. Every civilized country on earth is dotted with their selling stations. This foreign commerce is of immense volume, being 63% of the illuminating oil produced and of course a large per cent. also of the by-products.

In order to best economize their efforts, they put practically all this foreign trade under the control of one corporation, the Standard Oil Company of New York. That Company owns the ships, the docks, the selling stations in the different countries, with some few exceptions as in Great Britain where the Anglo-American Oil Company takes care of the selling business. The other companies that export oil

do it through the Standard of New York. The chief companies that thus export oil are the Standard Oil Company of New Jersey, the Atlantic Refining Company, Standard Oil Company of California, and the Standard Oil Company of New York.

These different companies are all named in Section Two of the decree, and it is difficult to see how the present arrangement can be continued without violating the sweeping terms of Section Six of that decree. If the Standard of California, the Standard of New Jersey and the Atlantic Refining Company all do their exporting through the Standard of New York, they will certainly not be competing in the foreign trade, and this would clearly be such an

> "express or implied agreement or arrangement together or one with another,"

as to come within the terms of Section Six of the decree.

This decree means, therefore, that all these different companies must enter the contest for the foreign trade, each fighting with the other. If they are to continue in that trade, each must buy or build ships, each must establish selling stations, each send representatives to the different foreign countries, underbid one another for the trade, each company scheme to supplant the other. Although France, for instance, is already well covered with selling stations by the Standard of New York, yet the other companies (all owned by the same men who own the Standard of New York) must enter that country, establish selling stations, actively compete with the Standard of New York and with each other to the great financial loss of all of them.

As in the above instances cited a competition in foreign trade *is to be created where none ever existed before.*

(f) It unlawfully restricts and limits the individual rights of each of the seven defendants by preventing each from purchasing with his individual means such of the properties of the Standard Oil Company of New Jersey as he may desire, and also restrains the stockholders and corporations from selling to one such properties.

It distinctly denies the right of an individual with his own means to buy all such properties.

The individual defendants and their associates, by the labor of their own hands, have built up a mighty business, not by combinations of and agreements with competing interests, but almost wholly by construction; they have divided the business for the purposes of local control and government into a number of different departments or agencies. These have each been put under the control of an agent, a sub-company. These latter are the sub-companies named as defendants in the petition.

May the courts, under the Sherman Act, split up this homogeneous business into as many independent parts as the owners have seen fit to create departments or agencies?

May the courts, under the Sherman Act, take away all control of the men who created both the sub-companies and the property under their control, and compel each of these agents, these sub-companies, to become independent, to compete with each other.

The decree must stand, if at all, upon one of two propositions:

(1) The Sherman Act forbids men to unite their abilities and their means, through partnerships and the like, for the joint development of an industrial enterprise; it denounces all united action, requires each man to work by himself;

(2) If men *may* work jointly, the Sherman Act requires that each industrial unit which they create must stand separate, apart, free from, hostile to every other industrial unit which they create. If they, the creators, hold these units jointly, and do not require, or at least permit them to compete with one another, they have formed a combination and a monopoly in violation of law, and may be sent to jail for the crime.

And is this not a demonstration, a *reductio ad absurdum*, conclusively showing that this decree cannot stand?

We submit that there are no precedents in the books nor logical reason justifying such a confiscatory, such a ruinous decree as entered in this case; that such a decree if carried to its logical conclusion attacks the very foundations of the modern business world.

THE GOVERNMENT, NOT HAVING APPEALED, CANNOT ASSIGN ERROR TO THE DECREE OF THE COURT BELOW, OR OBJECT TO ITS FINDINGS OF FACT, OR ASK TO HAVE ADDITIONAL FACTS FOUND WHICH THE COURT BELOW DID NOT FIND. IF THE FACTS FOUND ARE NOT SUFFICIENT TO SUPPORT THE DECREE, THE CASE MUST BE REVERSED.

The Government has not excepted to or appealed from the finding of facts in the decree of the Court below, and THEREFORE in a case of this nature where an extraordinary special remedy is given, it is concluded by such finding.

We submit that the Government must stand or fall on that opinion—on the findings of fact in that opinion—and on the decree.

We appealed from it. The Government did not.

We filed exceptions to it. The Government did not.

The Government, we submit, stands and must stand on that opinion and that decree. It cannot now and in this court claim another decree by disregarding that opinion and that decree.

The charges made in the bill were of a conspiracy in 1870 and different unlawful acts were charged prior to 1890. Rebates from railroads were charged. Illegal contracts with railroads were alleged. Unlawful acts of competition. All

these were in pursuance of a conspiracy made, the bill said, in 1870 and continued until 1906.

The Court below found the conspiracy originated *since* 1890, not in 1870 and followed by the unlawful acts prior to 1890, but the conspiracy did not originate until after 1890.

Is not this a distinct finding of fact, which, unappealed from by the Government, is conclusive on it? The words of the decree are:

The decree recited that (Section 1) in and prior to the year 1899 there were twenty corporations in various states engaged in commerce in petroleum and its products among the states, and that one of these was the Standard Oil Company of New Jersey;

> "that since the year 1890 the defendants named in section two of this decree have entered into and are carrying out a combination or conspiracy, in pursuance whereof about the year 1899" * * *

they increased the capital stock of the corporation and conveyed to it the different properties.

> "That this combination or conspiracy is a combination or conspiracy in restraint of trade and commerce in petroleum and its products among the several states, in the territories and with foreign nations. * * *"

Section 2:

> "That the defendants, John D. Rockefeller, William Rockefeller, Henry H. Rogers, Henry M. Flagler, John D. Archbold, Oliver H. Payne, and Charles M. Pratt, hereafter called the seven individual defendants, united with the Standard Oil Company and other defendants to form and effectuate this combination, and since its formation have been and still are engaged in carrying it into effect and continuing it."

Here follow the names of the different corporations, and this portion of the decree giving these names, then continues:

"have entered into and became parties to this combination and are either actively operating or aiding in the operation of it; that by means of this combination the defendants named in this section have combined and conspired to monopolize, have monopolized, and are continuing to monopolize a substantial part of the commerce among the states, in the territories and with foreign nations, in violation of section 2 of the anti-trust act."

Is not this a distinct finding of fact—which unappealed from by the Government is conclusive on it.

We have hereinbefore (pages 15-30) especially considered the Court's opinion on facts, and have called attention to the fact that no finding in that opinion supports the averments of the bill or conflicts with the findings of fact in the decree. In treating of the fact whether the seven did control the group, the Court found they did, but did not find they *conspired* to do any unlawful act prior to 1890. The Court did say they *combined* (not *conspired*) to secure control of competing refineries, but such *combination* was not unlawful if it used lawful means, and the Court did not find such unlawful means were used or intended.

Webster defines *Combine*:

"To form a union; to agree; to coalesce; to confederate."

He defines *Conspiracy*:

"A combination of men for an evil purpose. An agreement between two or more persons to commit a crime in concert."

If it is now alleged by the Government that there are facts in this case which the Court below should have found, but did not, and which facts the Government now asks this Court to find, the reply is the Government has not appealed, and under the established practice cannot now be heard to allege error on the part of the Court below.

What the Government asks this Court to do is practically to allow it to assign error.

This proceeding is in Equity, but by a special statutory proceeding wherein the power of the Court is sharply defined. It is a summary proceeding on

"petition setting forth the case."

As soon as the parties are notified

"the Court shall proceed as soon as may be to the hearing and determination of the case."

In such a proceeding, to allow the Government to turn its back on the case as the Court below ruled it, and claim that this Court should take up and consider nearly twenty thousand (20,000) pages of evidence in passing on disputed questions of fact, and that with the necessarily limited time counsel have for argument in the crowded condition of the dockets of this court they should argue and discuss such evidence, is, we submit, unreasonable.

A party cannot complain of a finding from which he has taken no appeal.

McGourkey vs. Toledo & Ohio Railway, 146 U. S., 536, 569:

"* * * as no appeal was taken by the defendant from this decree, of course it is not entitled to complain of this *finding* in this court."

Chittenden et al. vs. Brewster, 2 Wallace, p. 195:

"* * * the rule is settled in the appellate court that a party not appealing cannot take advantage of an error in the decree committed against himself, and also that the party appealing cannot allege error in the decree against the party not appealing. If the appellees desired to avail themselves of this error in the decree they should have brought a cross appeal. By omitting to do so they submit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing."

Carey vs. Brown, 92 U. S., p. 175.

The *"Stephen Morgan,"* 94 U. S., p. 604.

Mount Pleasant vs. Beckwith, 100 U. S., p. 527:

"Parties who do not appeal from the final decree of the Circuit Court cannot be heard in opposition to the same when the case is regularly brought here by other proper parties. They may be heard in support of the decree and in opposition to every assignment of error, but they cannot be heard to show that the decree below was erroneous."

Loudon vs. Taxing District, 104 U. S., p. 774:

"The city took an appeal from that part of the decree which gave to the appellant affirmative relief, but that appeal has been dismissed * * * for want of prosecution. The case stands here now as though no such appeal had been taken. The city can therefore only be heard in support of the decree as it stands. This has long been the settled rule in this court. An appeal

brings up for review only that which was decided adversely to the appellant."

Landram vs. Jordan, 203 U. S., p. 62:

"According to the rule that has been laid down in this court, Gabriella, as she did not appeal, cannot go beyond supporting the decree and opposing every assignment of error."

Daniell's Chancery Pleading and Practice, vol. 2, p. 1488:

"But if the application is to discharge an order as not being justified by the evidence which has been used in the Court below, the Court of Appeals looks at that evidence only which is recited in the order as having been read."

At p. 1459, note:

"The distinction between an appeal in Chancery and an appeal to the House of Lords is important, and should be borne in mind; for the effect of the appeal is different, and it is the latter class of appeals which prevails in the United States. An appeal in Chancery * * * is a rehearing, and the Appellate Court has power to deal with the whole case. *Kireton Coal Co.,* L. R. 7 Ch., 730. And the Appellate Court may make a decree as upon a trial *de novo.* * * * Upon an appeal to the House of Lords the respondent cannot argue, without a cross appeal, that the decree below was too favorable for the appellants. *Kellett vs. Kellett,* 3 H. L. Cas., 161; *Yates vs. University College,* L. R., 7 H. L., 438.

In the United States, as a general rule, the appellee cannot be heard to assign error." (See cases *ante*).

CASE CONSIDERED DE NOVO.

QUESTION.

From pages 4 to 10, *ante*, we have discussed the issue raised by the pleadings and we may here briefly re-state it thus:

Have the seven appellants and associates using different methods of holding their properties and carrying on business as private traders conspired or combined to restrain and gain a monopoly of interstate and international commerce by means prohibited by the Sherman Act?

We have so far endeavored to prove that the Court below was in error in finding:

(1) That the seven individuals controlled all the appellants.

(2) That the decree as entered,
   (a) was not justified nor required by the Northern Securities case;
   (b) that the mere transfer in 1899 of properties justly used in private trade to the Standard Oil Co. of New Jersey was not a violation of the Sherman Act;
   (c) That the decree in form far exceeded the power given to the Court sitting in Equity by the Sherman Act.

(3) We have suggested that the Government not having appealed is bound by the decree as to the questions of fact.

But now

(4) We propose to show considering the case *de novo* that it is without merit, and the petition should be dismissed.

IV.

THE THING WHICH, AND THE ONLY THING WHICH, THE GOVERNMENT, IN ITS PETITION, DOES COMPLAIN OF, IS THAT WE WERE, WHEN THE PETITION WAS FILED, THEN RESTRAINING AND MONOPOLIZING INTERSTATE AND FOREIGN TRADE IN OIL. WHATEVER TRADE THERE THEN WAS, WAS DISTINCT AND INDEPENDENT FROM WHATEVER TRADE THERE HAD BEEN IN 1890. THE GOVERNMENT DOES NOT AND CANNOT COMPLAIN OF OUR MONOPOLIZING (WHICH WE DENY) THE STATE INDUSTRY OF PRODUCING AND REFINING OIL; BUT ONLY THAT WHEN THE PETITION WAS FILED, WE WERE ACTUALLY RESTRAINING AND BY UNLAWFUL MEANS MONOPOLIZING THE THEN INTERSTATE AND FOREIGN TRADE IN OIL.

This Brief, in support of the foregoing proposition, discusses and maintains the following:

(1) The fact that the Standard Oil Company of New Jersey when the petition was filed, was the owner, either by direct title or through stock ownership where the legal title was vested in other corporations, of certain refineries, pipe lines, reservoirs, tank cars and other property, and was using them all under one ultimate management for the production or purchase of crude oil, its transportation and storage, and the refining of it and its products, and the sale of the same, does not of itself violate the Sherman Act. The appellants were lawfully entitled to so hold and use in interstate trade

such combined properties. To succeed in this case, the Government must also show that the said Standard Oil Company was then in 1906 using its power to actually restrain interstate or foreign trade in oil, or was then in 1906 atempting to or was by illegal means excluding others from said trade and attempting to monopolize the same, or a part thereof.

(2) That the Government's case depends solely and only on the Sherman Act, which Act is wholly prospective and not at all retrospective. That the Petition asking for equitable relief must of necessity assert, and the Government must maintain, that when the Petition was filed in November, 1906 (and not at some prior time), the appellants were *then* actually engaged in illegally restraining and monopolizing interstate and foreign trade in oil, contrary to the provisions of that Act. In such proceedings as this, the sole and only relief the Government can ask is to prevent, restrain and prohibit the continuation of the particular things which are violations of the Sherman Act.

(3) This case involves, and only involves, the question of the restraint and monopolization of inter-state and foreign trade in oil in November, 1906, when the Petition was filed; it does not involve any alleged restraint or monopoly of the oil industry in any of the States, and even if it had been proved (which it has not) that the defendants monopolized the production and refining of oil in each of the States in which it carried on business, or that it monopolized the sale of oil in each of those States (which it has not), these would in no way aid the Government in the maintenance of the present suit, which involves only the question of the violation of the Federal Statute, which statute is passed to protect only interstate and foreign trade.

(4) Each of the alleged conspirators in this case as citizens of the United States had the right as such citizens

to adopt such calling or trade as to him was most conducive to the exercise of his liberty, and to enter, if he desired, into interstate and foreign trade; and having adopted such trade or industry, it became his property just as much as if he had invested his money in a parcel of real estate. Each had the right to follow such trade, associate himself with others, and adopt such means, as the formation of partnerships, trusts and corporations, which the law allowed in so following; and to use all his ingenuity, skill and property to make his business a success. He might lawfully enter and compete for the interstate and foreign traffic; there is no federal law which limits or attempts to restrict the extent to which he may compete for that interstate and foreign traffic, or denies his right to associate others with him in partnerships or in corporations or so-called trusts, in such competition.

(5) The federal law allowed and allows each of the individuals to compete freely for the interstate and foreign traffic in oil and its products. He may use all the weapons his ingenuity and skill can suggest to wage a successful warfare. His rights to compete are not limited to merely such as are *fair or reasonable,* but are only limited by such as are *unlawful* and directly tend to the violation of the Sherman Act. No federal law has or does restrict such competition by saying it must not be *"unfair"* or *"undue"* or *"unreasonable,"* but gives the widest liberty in such strife and limits the means only by forbidding the use of that which is unlawful.

The federal law also allows and assures to each competitor whatever share, however large, of the interstate or foreign trade in oil he or they may win. Provided his means are not unlawful, he may win all he can of such trade, even gain a temporary monopoly and temporarily fix prices. Such

monopoly is comparatively harmless if the future trade is left open to competition.

(6) The Sherman Act was passed to protect trade and further competition. The Act does not forbid, but recognizes as lawful, combinations, corporations, and trusts engaged in interstate and foreign trade, and only prohibits them from making contracts directly, substantially and immediately restraining such trade or attempting by unlawful means to monopolize the same.

It makes such restraint and monopoly a crime and inflicts, on conviction, severe penalties for such offense.

It does not limit the quantity of such trade any one or more may gain. It does not forbid the legitimate growth of lawful business, however great that growth may be, nor does it forbid the wealthiest of corporations and men to engage in such trade.

It permits one set of competitors to purchase the property of other competitors solely to avoid further competition. The mere size of the competing corporations or combinations is immaterial.

In addition to the indictment and punishment, and distinct from it, the act allows the courts, on petition of the Government, to restrain, prohibit and prevent the continuance of acts forbidden by said act, and which it makes crimes.

To sustain the present petition, the Government must clearly prove:

(1) The commission by appellants of a crime.

(2) That such crime was actually being committed when the petition was filed in November, 1906.

(7) The alleged monopoly that is complained of is not in the ownership of the oil or refineries or pipe lines themselves, nor in the production or refining of oil, but merely in the intangible, shifting, uncertain thing called interstate and foreign trade in oil.

The monopoly of a trade at common law was forbidden because, and only because, it excluded all others from practicing such trade, and seems to have been then limited to a Royal Grant, as, for example, giving the exclusive right to manufacture playing cars. It was and is, a distinct thing from engrossing, regrating or forestalling the market, all of which were based on the prevention of artificial prices for the necessaries of life. No one of these falls under Federal jurisdiction but each is subject to state control only. To prove a monopoly as is here alleged, the Government must show that the monopoly (using the word in its popular sense) was created by unlawful means and that the defendants, *when the petition was filed,* were using *unlawful* means to exclude others from the trade.

(8) The present litigation is between the Federal Government and certain of its citizens. The questions involved are solely the rights of these Federal citizens and the effect upon those rights of the Sherman Act, and whether these Federal citizens have violated the provisions of that Act.

The violation of that Act, the Act itself makes a crime, and the Government must prove the commission of such crime by acts unlawful under Federal laws.

There was and is no such thing as a Federal crime, aside from express Congressional acts, and as no such act was

in existence prior to 1890, as to the matters charged in the petition, all the matters and things done by the defendants prior thereto are immaterial.

(9) The character of the oil business was and is such that a great corporation was and is an economic necessity for carrying on that industry; the facts in this case and the history of the development of the oil industry prove that what is commonly called the Standard Oil Company was the necessary means by which the industry was fostered and advanced, and without which it would have languished and been much less successful. The growth and success of the Standard Oil Company was the result of the individual enterprise and the natural laws of trade, and the position gained by it was the natural result of the lawful use of competition directed to a unique and unparalled business by a strong, earnest, intelligent group of men with abundant capital, where the risks and the uncertainty of the business justified more than usual profits in the handling of the same. It was not the result of unlawful means but of skill, unremitting toil, denials and hardships, where continuous use of skill, labor and capital in forty years reached a great success.

(10) To prove a violation of Section one of the Sherman Act the Government must show when the petition was filed that we were then by contract actually restraining interstate trade in oil.

To prove a monopoly under Section two of the Sherman Act, the Government must show:

(1) That the appellants were, when the Petition was filed, then using unlawful means to maintain their control of the industry.

(2) That the appellants were then by unlawful means excluding others from said industry.

DISCUSSION.

(1) This case is one where individual citizens, being the joint owners of private non-competitive properties, are using the same in private trade.

They are not in a public or *quasi* public business. Their business is confined to one thing only: i. e., crude petroleum and its products. They are producers, manufacturers and traders in it. As such, their rights and privileges are far different from that of competing railroads or gas companies or businesses oroccupations impressed with a public duty. They may deal with whom they chose and refuse to deal with others. They may compete for the whole interstate trade in oil and lawfully win. The extent of their properties, the extent of their business, the eager energetic methods with which it is carried on, are not forbidden, but are encouraged by the law. The partnerships, limited partnerships and corporations through which they work are all private traders, and if the Petition in this case is to be believed, managed and controlled by the seven individual appellants.

Their pipe line system is an indispensable and absolutely necessary adjunct to their refineries, to transport to them the oil. They do carry principally from the wells to their reservoirs or tanks oil for others; but this is a distinct and comparatively small part of their business, and does not characterize or stamp or necessarily connect itself with their other and main business of refining crude petroleum and selling the refined oil and its by-products.

The consideration of the case should begin with a recognition of these facts, and the acknowledgment of the truth

that such cases as the Trans-Missouri Freight Association, the Joint Traffic Association and the Northern Securities Company are entirely different, governed by different rules; and to consider them is merely to mislead as the Northern Securities case did the Court below.

We should also remember that the Court below declined to find in favor of the Government on the charges in the petition of fraud and unlawful conduct which were denied in the answer and on which issue was joined.

(II) This case only involves interstate and foreign commerce; and limiting even the word "commerce," I further state that this case only involves interstate trade in oil and its products. I include in the word "trade"

(a) the article traded in while, but *only while,* it is in actual transit from one state to another;

(b) the bargaining for the same or exchange of the articles;

(c) The transportation from one state to another of the articles.

All three of these make up the interstate and foreign trade. Such trade has no direct relation to the *ownership* of the article traded in, but solely and only to its presence as the thing transported and bargained about. When you speak of interstate trade, you mean not the article dealt in, except as the object of trade, but the bargaining for the selling of and the transportation of that article between the states.

The oil, before it goes into interstate trade, is not under Congressional control.

The federal Government does not concern itself with how one acquired the article put into interstate trade.

When the article traded in has been joined with the general mass of state property, it has passed out of interstate trade, and no matter what may be the future means used to gain the state trade in that article, this does not violate the Sherman Act or bring it under federal control.

Anything then done *before* the oil got into interstate commerce, or *after* it got out of interstate commerce, cannot be a violation of the Sherman Act.

(III) This case in nowise involves any question under the statutory laws of any of the States, or of the common law of any of the States in reference to what constitutes a restraint of trade or a monopoly of trade, or any policy of Ohio or Illinois. No matter what violations there may or may not have been of State laws or of the common law of any one of the States as to restraint of trade or monopoly, such are now and here wholly unimportant.

As the Supreme Court said in the *Knight & Co.* case, 156 U. S., 10, the

> "monopoly and restraint denounced by the Act are the monopoly of interstate and international trade or commerce,"

and not of

> "a monopoly in the manufacture of a necessity of life."

This case does not involve how or when or by what means the appellants acquired their title to all their properties; or whether in any respect they violated any of the State laws

in so doing; whether, for example, in any State they gained a monopoly of the refining business or the pipe line business. All these things are matters between the several States and the appellants and not between the United States and the appellants.

> "The power of the State to impose restraints and burdens on persons and property in conservation, and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States; not surrendered by them to the general Government."
>
> Fuller, C. J., *Lottery case,* 188, U. S., 364.
> *Douglass vs. Kentucky,* 168 U. S., 488.
> *U. S. vs. E. C. Knight & Co.,* 156 U. S., 16.

The present case solely and only involves *the use* of products of that property in the interstate trade, and while it is so in it. Until it enters into the interstate trade, its acquisition and ownership are matters not within Federal jurisdiction.

Fuller, C. J., said in the *Knight Case,* 156 U. S., 16, that Congress did not attempt by the Sherman Act to

> "*assert* the *power* to deal with *monopoly* directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control or disposition of property; * * * *or to make criminal* the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted."

The extent to which Congress may control the ownership, is not here for discussion, for in the Sherman Act it is only sought to control—*not* the thing itself—(except where it

authorizes its forfeiture) but contracts, combinations, conspiracies and monopolies which interfere with and restrain free open trade between the States. In this suit the petition mentions crude oil and its products. It alleges violations only of the Sherman Act.

The sole question is:

Are the appellants violating the Sherman Act; and the sole statute we have to study and construe is the Sherman Act. Unless the Government has proved that when the petition was filed the appellants were *then* actually violating the Sherman Act, its case fails.

Let me assume (what is not a fact) that the appellants have gained a monopoly of the manufacture of refined oil and practically control the refining of oil in different States. Admittedly, that is not a matter of which this Court has jurisdiction, or, indeed, can have. The alleged violation of State laws or the formation of State monopolies or the creation of restraints of trade inside the States is foreign to the discussion.

This case does *not* involve any title or property right of the appellants. All such titles and property rights are conferred and governed by the laws of the several States, and over those cases and over such property or property rights congress has no control.

In the *Northern Securities Case,* Mr. Justice Harlan said that the purchase of stock in a State corporation—the acquisition and sale of property—were under State control; and

he added that the Federal Courts of Federal laws could not compel the dissolution of a State corporation.

Northern Securities Case, 193 U. S., 197.
Kidd vs. Pearson, 128 U. S., 1.

This does not deny that to determine whether the appellants have violated the Sherman Act you may take into consideration all the facts and circumstances in the case, but it does deny that because the appellant may or may not have used in different instances improper methods to gain State trade or properties, you can infer from such State violations that the defendants violated the laws for interstate trade.

(IV) These appellants have not been indicted and are not being tried on the criminal side of the court for something HERETOFORE done in violation of the Sherman Act. The Sherman Act does provide penalties for such violation, makes the crime a misdemeanor, and declares that, on conviction thereof, certain punishments shall be inflicted. That portion of the Act is the criminal portion, and clearly indicates a trial in the methods assured to the individual by the Constitution of the United States. Such a trial, under the Federal Constitution, Article III, must be by jury; the proof would have to be beyond a reasonable doubt; the charge would be a prior well-defined act; and the results would have far other and different consequences than under the present case.

In one sense, indeed, the two distinct, independent provisions of the Act, i. e., punishment for a crime already committed and prevention of further commission of a continuing crime—have close connection with each other; for to

find an indictment on the criminal side as well as to file a petition on the civil side, requires proof of the identical crime. The difference is that on the criminal side you refer solely to the past, while on the civil side you refer solely to the present.

The Sherman Act is a Criminal Statute.

United States vs. Freight Association, 58 Fed. 58, 77, Sanborn, J.:

> *"The Anti-Trust Act is a criminal statute."*

Northern Securities Company vs. United States, 193 U. S., 197, 401, Holmes, J.:

> "The *statute* of which we have to find the meaning *is a criminal statute.* The two sections on which the Government relies both *make certain acts crimes.* That is their immediate purpose, and that is what they say. It is vain to insist that this is not a *criminal proceeding.* The words cannot be read one way in a suit which is to end in fine and imprisonment, and *another way in one which seeks an injunction.*"

As the thing charged is a crime, it is by no means certain that the Government should not prove its case beyond a reasonable doubt.

In considering the degree of proof, the Supreme Court of Missouri said in *State vs. Continental Tobacco Co.*, 177 Missouri, page 1:

> "However, it must be remembered that this proceeding partakes of the nature of a criminal prosecution, severe penalties are imposed; hence, it is not sufficient

to warrant a finding adverse to respondents, that we may entertain strong suspicions, or even strong probabilities, of their guilt.

Such conclusion should only be reached upon a clear showing of the testimony, fully satisfying the minds of the Court that they were guilty of the violations of the law as charged in the information."

The Sherman Act has no retroactive effect, but is prospective only.

The Supreme Court said in the *Trans-Missouri Case,* 166 U. S., 342, that

"there can be no question of any act being regarded as a violation of the *statute* which occurred *before it was passed.*"

In *Deuber Watch Company case,* 66 Fed. Rep., 637, 641, the Circuit Court of Appeals said that the only acts that the plaintiff could contend were forbidden by the Sherman Act

"are those done after its passage."

(V) That the case involves the Sherman Act only, and not some supposed Federal common law, and is governed and must be determined solely by the Act, seems perfectly plain.

The petition's prayers for relief are only under the Sherman Act.

Thus the first prayer is that the Court decree that the acts done are

"in violation of the Act of Congress of July 2nd, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies."

The second prayer is for a decree that the individual defendants

> "in violation of the provisions of Sections 1 and 2 respectively of the said Act of Congress, approved July 2nd, 1890, entered into an agreement," etc.

The third prayer is that the holdings etc., be decreed

> "to be in violation of said Act of Congress."

So each of the other prayers is based solely on the Sherman Act.

There is no other federal statute authorizing the filing of such a petition, or giving the extraordinary power to a court of equity to restrain the commission of a crime in such cases as alleged in the petition.

The prayer that the acts done under the alleged conspiracy

> "are in derogation of the common rights of all the people of the United States"

is probably rhetorical and so intended, because no one could suppose this court had such power.

The *Wilson* Act merely refers to imports from foreign nations, and not to interstate or foreign export trade, and therefore has no application to this case.

In the *Addyston Pipe Case,* 78 Fed. Rep., 712, where the United States filed the petition, the Court said:

> "In a suit such as this in the name of the United States jurisdiction depends *alone* upon the (Sherman) Act."

Not upon any alleged Federal common law, but solely upon the Sherman Act.

(VI) The size or magnitude of a business is not controlled by the Sherman Act, and therefore the size of the Standard Oil Company, its large properties, resources and power are just as lawful under the Sherman Act as if it owned one refinery instead of eighteen, or one mile of pipe line instead of thousands.

The Court below so ruled:

"* * * monopolies of part of interstate and international commerce by legitimate competition, *however successful*, are not denounced by the law and may not be forbidden by the Courts." (Rec. A, p. 585).

Judge Hook said:

"Magnitude of business does not alone constitute a monopoly, nor effort at magnitude an attempt to monopolize." (Rec. A, p. 589).

And again Judge Hook said (Rec. A, p. 590):

"Success and magnitude of business, the rewards of fair and honorable endeavor, were not among the evils which threatened the public welfare and attracted the attention of Congress."

In the *Northern Securities Case* (193 U. S., 407), Justice Holmes said, speaking of the size of the corporation or its wealth or power:

"* * * the act of Congress makes no discrimination according to size. Size has nothing to do with the matter."

In *United States vs. American Tobacco Company*, 164 Fed., 700, 709, Judge Coxe said:

> "It has never been held that the mere fact that a business is large and is extended over a wide territory renders its promoters amenable to the statute. Success is not a crime."

United States vs. American Naval Stores Co., 172 Fed., 455, 458, 459, (So. Dist. Ga., May 12, 1909):

District Judge Sheppard, charging the jury in an indictment under *Sections One and Two* of the Sherman Act:

> "* * * the essence of the monopoly 'is found not so much in the creating of a very extensive business in the hands of a single control.' *The size of a business is not in itself a violation of this law, and should carry with it no great weight in considering the second count* (under section two) of the indictment. The criminal act in the statute is the certain and necessary prevention of all other persons from engaging in such business, and thereby stifling competition. *The evil is not the enlargement of the trade* of one person or corporation, but the destruction of the trade of all other persons in the same commodity."

Commissioner Smith, of the Bureau of Corporations, says in his report:

> "Corporate combination, as such, appears to be not only an economic necessity, but also largely an accomplished fact. * * * It is not the existence of industrial power, but rather its misuse, that is the real problem. * * * Corporate methods, not corporate existence, is the question at issue. The Government should direct its attention toward preventing such unfair methods, and toward keeping open the opportunities for competition in industry."

This idea is very clearly expressed by Judge Jackson *In Re Greene*, 52 Fed., 104, 115:

"It is very certain that *Congress could not*, and did not, by this enactment, attempt to prescribe limits to the acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the *accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein*, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises, involving the purchase, sale or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged and developed. But *the magnitude of a party's business*, production or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production or manufacture, *is not the monopoly* or attempt to *monopolize*, which the statute condemns."

In re Corning, 51 Fed., 205, 211:

"From these debates it is evident that the Congress did not intend to limit the amount of capital a citizen should invest in any line of business, or restrain his energy or enterprise in acquiring for himself all the trade possible in such business, provided in doing so he did not, by illegal contract or devices, restrain others from pursuing the same business, or deprive the public

from enjoying the advantage of the free use of capital, skill and experience of competitors."

In *Eddy on Combinations,* Sec. 177:

"The magnitude of the combination has a direct bearing upon the power, but not upon the character of the combination. The legality of a combination is not determined by the extent of its power or influence."

The Supreme Court of Illinois in *Coquard vs. National Linseed Oil Company,* 117 Ill., 480, 484, said:

"About the only fact, however, averred in the bill which might constitute a part of the facts necessary to show a trust is that the defendant has acquired a great many oil mills and plants, and is managing a large business. The facts pleaded are insufficient to show the existence of a trust."

In the *Mogul Steamship Case,* L. R., 23 Q. B., 598, Lord Justice Bowen said (p. 618):

"It is perfectly legimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital, apart from combination, may be legimately used in trade. To limit combinations of capital when used for purpose of competition in the manner opposed by the arguments of the plaintiffs, would in the present day be impossible—would be only another method of attempting to set boundaries to the tides."

(VII) The Sherman Act does not prohibit in private trade, but recognizes as lawful, the association of individuals as joint owners—partners—or in corporate form or trust form, to hold and use properties and engage in interstate trade and commerce.

Read the Act and this point is demonstrated:

Section 1 does not prohibit

"combinations in the form of trust or otherwise,"

but only prohibits them when they are

"in restraint of trade or commerce among the several states."

Section Two does not denounce either trusts or partnerships or corporations or joint owners from engaging in interstate commerce, but only prevents them when they

"combine or conspire"

"to monopolize any part of the trade or commerce among the several states."

Section 8 defines "person"

"to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any Territory, or the laws of a foreign country."

In the *United States vs. Joint Traffic Association,* 171 U. S., 505, Mr. Justice Peckham said (567):

"* * * we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership."

Chesapeake & Ohio Fuel Co. vs. United States, 115 Fed., 610, 620, Day, Circuit Judge:

"Looking, then, to the contract in question, we find fourteen of the coal producers whose aggregate production is five thousand tons a day, entering into an agreement which, *without making a partnership,* undertakes to control the entire output of the several mines."

Northern Securities Co. vs. United States, 193 U. S., 197, 410, Holmes, J.:

"*A partnership is not a contract or combination in restraint of trade* between the partners unless the well-known words are to be given a new meaning invented for the purpose of this act."

Oakdale Manufacturing Co. vs. Garst, 18 R. I., 484; 23 L. R. A., 639:

"It does not follow that every combination in trade even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury that that which it would seek to cure. It would be impracticable. It would forbid *partnerships* and sales by those engaged in a common business. It would cut off consolidation to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties, and not injurious to the public. Monopolies are liable to be oppressive, and hence are doomed to be hostile to the public good. But combinations for mutual advantage, which do not amount to a monopoly, but leave the field of competition open

to others, are neither within the reason nor the operation of the rule."

In *Deuber Watch Case Co. vs. Howard Watch Co.*, 66 Fed., 637, 643, Judge Lacombe, for the Circuit Court of Appeals, said:

"The total amount of any given commodity which will be purchased by a community is limited, and when several sellers of such commodity *enter into a combination in the form of a partnership, and by* ingenious advertising, or by *competition,* or by the offer of favorable terms to buyers, enlarge their own trade in such commodity, they restrain to some extent the trade of one or more of their competitors therein. But no one, not even the plaintiff-in-error, *contends that the statute forbids any such acts,* although, if the words be taken with absolute literalness, the phrase 'restraint of trade' is broad enough to cover them."

In re Greene, 52 Fed., 104, Judge Jackson (p. 115):

"It is very certain that Congress could not and did not, by this enactment, attempt to prescribe limits to the acquisition, either by private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the *accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein,* or any part thereof, among the States, a criminal offense was committed by such owner or owners. * * * (p. 112) Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exer-

cise of a public privilege or franchise conferred by the United States. *But Congress certainly has not the power or authority under the Commerce clause, or any other provision of the constitution, to limit and restrict the right of corporations, created by the States, or the citizens of the States, in the acquisition, control and disposition of property.*"

Northern Securities Co. vs. United States, 193 U. S., 197, 361, Brewer, J.:

"Further, *the general language of the Act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen.*"

In *Smiley vs. Kansas,* 196 U. S., 147, Mr. Justice Brewer said (456, 457):

"Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom, parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power, and those which are subject to prohibition or restraint. But a secret arrangement by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed *without any merging of interests through partnerships or incorporations,* is one to which the police power extends."

(VIII) The Sherman Act was passed to further trade, and any private trader may lawfully join with him any competitive private trader, or buy his business and property and include such property and business with his own.

We turn again to the words of the Sherman Act—

Nowhere in it is there any prohibition of the joining of any two or more together as partners or joint owners, or in corporate form to carry on business. There is no word prohibiting the joining of a competitor or the purchase of his business or property. On the contrary, the words of Sections One, Two and Eight, by plain implication, so allow.

And such is also the result of the cases under it.

It is not illegal under the Sherman Act for individuals to buy up the properties and business of competitors.

Northern Securities Co. vs. United States, 197 U. S., 361, Brewer, J.:

> *"Further, the general language of the Act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen.* If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock

in the Great Northern Railway Company, he could not by any acts of Congress be deprived of the right of investing his surplus means in the purchase of the stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right which all other citizens have of purchasing Northern Pacific stock could not be denied to him by Congress, because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall vs. Great Northern Railway,* 161 U. S. 646, in which this Court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Railway Company. 'Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the re-organized company; and thus possibly obtain its ultimate control; but the companies would still remain separate corporations, with no interests, as such, in common.' "

See Mr. Justice Holmes to the same effect:
Northern Securities Case, 193 U. S., 409.

Smiley vs. Kansas, 196 U. S., 457.
In re Greene, 52 Fed., 104.

Davis vs. Booth, 131 Fed., 566:
The Court (Severens, J.) said (p. 37):
"It may be that the practice of acquiring by a single corporation, through purchase of a great number of single plants in several states, of power to control

the market of a given commodity in a wide area of territory, may become injurious to the public; but if so, it would seem that the limitations and the means for the restriction and correction required must be supplied by the lawmaking power, since the old law against forestalling the market has become obsolete."

Certiorari denied, by U. S. Supreme Court, Per Curiam. 195 U. S., 636.

Robinson vs. Brick Company, 127 Fed., 804 (C. C. A.)

A number of competing brick plants in West Virginia and Ohio agreed to sell their plants to one corporation and gave restrictive covenants. Afterwards in attempting to enforce these covenants, the Court overruled a defense that the whole transaction was void, *inter alia,* under the Sherman Act.

Cincinnati Packet Co. vs. Bay, 200 U. S., 179.

The Packet Company had bought up a number of rival packet companies on the Ohio River trading between Cincinnati, Portsmouth and the intervening towns in Ohio and Kentucky. In attempting to enforce a restrictive covenant contained in the agreement of sale it was objected that the whole transaction was void under the Sherman Act.

The Court, Mr. Justice Holmes, seemingly assuming that the purchases were not illegal, held that whatever restraint of trade resulted from the competitors going out of business was incidental and remote.

United States vs. Joint Traffic Association, 171 U. S., 505, 567.

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or

merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term. And the sale of the good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the Act; and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business."

United States vs. Addyston Pipe & Steel Company, 85 Fed., 271.

Among the agreements which Judge Taft in the above case cited as being perfectly valid both at common law and under the Act of 1890 was a restrictive covenant by a seller of a competing business that he would not engage in business to the injury of the good will sold. And he said (280):

"It was of importance, as an incentive to industry and honest dealing and trade, that, after a man had built up a business with an extensive good will he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell."

In *Dolph vs. Troy Laundry Machinery Co.,* 28 Fed., 553, 555, Judge Wallace said:

"It is not obnoxious to good morals, or to the rights of the public, that two rival traders agree to consolidate their concerns, and that one shall discontinue business,

and become a partner with the other, for a specified term. It may happen, as the result of such an arrangement, that the public have to pay more for the commodities in which the parties deal; but the public are not obliged to buy of them. Certainly, the public have no right to complain, so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly."

U. S. vs. Knight & Co., 156 U. S., 1.

National Benefit Company vs. Union Hospital Company, 45 Minn. 272 (11 L. R. A., 437, 440) Mitchell, J.:

"The general *concensus* of all the authorities, at least the later ones, is * * * that *a party may legally purchase the business and trade of another for the very purpose of removing or preventing competition.*"

Diamond Match Company vs. Roeber, 106 N. Y., 473, 843:

"We suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition."

Trenton Potteries Company vs. Oliphant, 58 N. J. Eq. 507 (46 L. R. A. 255, 263):

"A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may luwfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors,

the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions, if such could be imposed, upon the acquisition of such property, and its us when so acquired courts could impose no limitation * * * It follows that *a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or, for a time at least, destroy, competition.*"

See the very late opinion of Judge Lurton in the *Calument and Hecla Company* case. (*Ante*, p. 110).

(IX) To prove that the appellants conspired to or did monopolize a whole or part of the inter-state trade in oil, the Government must prove that the appellants

(1) Conspired to obtain control of such trade by *excluding all others from it.*
(2) Conspiracy to do this by the use of *unlawful* means.
(3) If a combination did exist, and the appellants actually gained such a monopoly by *lawful* means, through the legitimate growth and development of its business, and by the lawful use of competition, then they were not guilty of a violation of the Sherman Act—even though they *excluded* to some extent others from such business.

In other words:

A lawful monopoly may be gained under the Sherman Act.

The Court below so ruled in this case (Rec. A, p. 585):

"* * * Monopolies of part of interstate and in-

ternational commerce by legitimate competition, however successful, are not denounced by the law and may not be forbidden by the Courts."

See also Judge Hook's opinion.
Justice Holmes, 193 U. S., 408.
Judge Putman, 55 Fed., 640.
Judge Sanborn, 125 Fed., 454.

It is only the monopoly gained by using unlawful means, and thus excluding others from the trade, that the Sherman Act condemns.

In the opinion of the lower Court in this case Judge Sanborn said of the Sherman Act (Rec. A-585):

"Its true construction is that while *unlawful means* to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoinable under it, monopolies of part of interstate and international commerce, by *legitimate competition, however successful,* are not denounced by the law."

And in his concurring opinion Judge Hook said (Rec. A-589, 590):

"*Magnitude* of business does not, alone, constitute a monopoly, nor effort at magnitude and attempt to monopolize. To offend the act the monopoly must have been secured by *methods contrary to the public policy* as expressed in the statutes or in the common law. * * *

"Success and magnitude of business, the rewards of fair and honorable endeavor, were not among the evils

which threatened the public welfare and attracted the attention of Congress. But when they have been obtained by *wrongful or unlawful methods,* and competition has been crippled or destroyed, *the elements of monopoly* are present."

This Court said in *National Cotton Oil Co. vs. Texas,* 197 U. S., 129, that a monopoly is now

"understood to include 'a condition produced by the acts of mere individuals.' Its *dominant thought* now is, to quote another, 'the notion of *exclusiveness* or unity;' in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' "

Holmes, J., in the *Northern Securities Case,* 193 U. S., 401, again emphasized the idea that monopoly was exclusion.

In *Whitwell vs. Continental Tobacco Co.,* the Court expressly held that the Tobacco Company had gained a monopoly of part of the tobacco trade, but upheld it as lawful under the Sherman Act.

United States vs. Trans-Missouri Freight Association, 58 Fed. Rep., 82, Sanborn, J.:

"A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to or

the exclusive control of that trade; and (2) the exclusion of all others from that right and control."

It is grasping the control of a trade by a few persons who have combined and conspired with each other for the purpose and with the intent and with the idea of gaining by all means the power to control for the maleficent purpose of fixing the price of the article dealt in. It involves the use of unlawful means—trickery and fraud stamped by the law as criminal. It is in marked contrast to the *legitimate growth of a lawful business.*

The things the monopolist seeks for and gains is the ability to control prices and suppress competition; while the thing the competitor seeks for is the *extension of his trade by lawful means.* This extension may give control of trade and enables one to fix prices, but it is the reward of competition which the law allows. The successful trader may not gain such absolute control, and if he does will hardly continue to hold it if the door competition is left open.

The mere ability of a merchant to fix the price at which he will buy and sell any given line of goods is his individual right, and if he has partners, the right of his associates and of the partnership. So long as he restricts that right to fixing his own price at which he will buy or sell this line of goods, he is strictly within his lawful rights and no one may complain. Indirectly the price that he pays may affect the market price, and probably will, but in so far as he merely fixes his own prices and does not seek by devices and tricks and any unlawful means to fix the price for others, he is not committing an unlawful act.

Judge Taft's Definition of Monopoly.

Judge Taft, not indeed, from the Bench, where, I agree, the authority would be more pronounced, but with great solemnity in his inaugural address on March 4th, 1909, said, speaking of American business and the stability and certainty of the same, that any plan determined upon by the Federal Government

> "must include the right of the people to avail themselves of those *methods of combining capital and effort deemed necessary to reach the highest degree of economic efficiency at* the same time *differentiating* between combinations *based* upon *legitimate economic reasons,* and those *formed* with the *intent* of creating monopolies and *artificially* controlling prices."

Judge Taft, on August 19th, 1907, at Columbus, Ohio, referring to the Sherman Act, said:

> "The Supreme Court of the United States has not defined what a monopoly under this section of the anti-trust law is. I conceive that it is *not* sufficiently defined by saying that it is the *combination* of a large part of the plants in the country engaged in the manufacture of a particular product in one corporation. There *must be something more* than the mere union of capital and plant before the law is violated. There must be some use by the company of the comparatively great size of its capital anl plant and extent of its output *either to coerce* persons to buy of it rather than of some competitor, or to coerce those who would compete with it to *give up their business.* There must, in other words,

be an element of duress in the conduct of its business towards the customers of the trade and its competitors before mere aggregation of plant, becomes an unlawful monopoly."

In *Wharton's Criminal Law*, Vol. 2, page 219, Sec. 1369, he states that to constitute a monopoly there must be shown

"*Coercive* or *fraudulent* means or the absorption of an entire necessary staple."

United States vs. Patterson, 55 Fed. Rep., 605, 638, Putnam, Circuit Judge:

"Ordinarily a case cannot be made under the statute unless the means are shown to be *illegal*, and therefore it is ordinarily necessary to declare the means by which it is intended to engross or monopolize the market."

United States vs. American Naval Stores Co., 172 Fed., 455, 458, 459 (May 12, 1909).

Sheppard, J., charging the jury in indictments for violations of Sections One and Two:

"It is sometimes difficult to distinguish between a legitimate business enterprise and an illegal monopoly. From the law as has been interpreted, it may be said, however, that the monopoly is the power acquired over

the traffic, sale and purchase of a commodity, in the course of interstate or foreign commerce, by which the free flow of such commerce and competition in such commodity is necessarily crushed and stifled. Since the size of the business alone is not necessarily illegal, it is the crushing of competition, by *means of force, threats, intimidation, fraud or artful and deceitful means and practices,* which violates the law. You will consider carefully all the *means* which the indictment charges, and inquire (1) whether the defendants, or any two or more of them, did in fact unlawfully combine, conspire, confederate, and agree together to 'monopolize,' by acquiring such power over the disposition of rosins, turpentine, and naval stores, which were the subject of interstate and foreign commerce, so that they were capable of forming, and did form, a scheme to crush and stifle competition; and (2) if such scheme of gaining and controlling business was to be effected *by illegal methods of force, threats, intimidation, fraud or artful or deceitful means and practices,* which their competitors in such trade were necessarily unable to meet. The size of business, and the gaining of business popularity, fair dealing, sagacity, foresight, and honest business methods, even if it should result in acquiring the business of competitors, would not make an illegal monopoly. It is the acquisition and use of unfair and illegal power in defeating competition which makes such illegal monopoly."

Fonotipia Limited vs. Bradley, 171 Fed., 951, 959 (E. Dist. N. Y., Aug. 7, 1909):

Chatfield, District Judge:

"* * * nor is a 'monopoly,' in the sense meant by the statute, *merely the complete occupation of a cer-*

tain field where that occupation does not unfairly exclude other competitors. The fact that a certain person is the only dealer in certain goods may be entirely consistent with a free and unlimited opportunity to every other person to deal in the same goods, and the law of proper demand and supply may result in but one source from which certain things can be secured, without thereby rendering the person supplying these goods liable to the accusation of illegally maintaining a monopoly. A certain intent and certain motives, which need not be discussed at length, must be present to establish the interference with competition and the existence of the monopoly at which the statute above mentioned was aimed and which is included within its provisions. A mere attempt to obtain a fair profit, even by an agreement not to undersell, must be tested by the measure of what would be a fair price under competition, and it must be determined whether the centralization or control of the output is intended to or does accomplish any interference with the free action of independent parties who might compete, or with the securing to the public of all the benefits to which they are entitled, over and above the reasonable cost of production and reasonable profit."

United States vs. American Tobacco Co., 164 Fed., 700, 722, 727. Judge Ward, in his dissent, said:

"It remains to inquire whether the American Tobacco Company and its controlled companies constitute a monopoly of or attempt to monopolize a part of the foreign commerce or commerce between the states under the second section of the Sherman Act. As this section prohibits a monopoly of or an attempt to monopolize any part of such commerce it cannot be literally construed. So applied, the act would prohibit commerce altogether.

The first and second sections must be read together, and I think mean the same thing; the second adding nothing except to extend the prohibition to individuals who, without combination, monopolize or attempt to monopolize. *It must* be understood to *prohibit monopolies* or attempts to monopolize *brought about by the unlawful means contemplated in the first section*, viz., the purpose to restrain trade by *preventing competition* and preventing others from participating in it. The third section of the act bears out this construction, because it does not mention monopolies, or attempts to monopolize in the territories of District of Columbia, where the jurisdiction of the United States is supreme in all things, and it can hardly be that Congress intended to declare innocent acts committed within them which it pronounces crimes if committed in the states."

West Virginia Transportation Company vs. Standard Oil Company, 50 W. Va., 611 (1900):

"This monopoly * * * is the act of persons and corporations, by union of means and effort, drawing to themselves, in the field of competition, the lion's share of trade. This is not monopoly condemned by law."

JUDGE SANBORN'S OPINION IN THE CONTINENTAL TOBACCO CASE.

In *Whitwell vs. Continental Tobacco Company*, 125 Fed. Rep., 454, the Circuit Court of Appeals of the Eighth Circuit, Sanborn, Thayer and Vandevanter sitting, Judge Sanborn delivered the opinion.

The facts were that the Continental Tobacco Company was a manufacturer of tobacco which owned and controlled most of the valuable and leading brands of plug and chewing tobacco in the United States (p. 456),

"and fixes the market prices thereof."

The Court said (457):

"The test of the legality of a combination under the act which was inspired by this purpose is its direct and necessary effect upon competition in commerce among the states. If its necessary effect is to stifle or to *directly and substantially* restrict free competition, it is a contract, combination or conspiracy in restraint of trade, and it falls under the ban of the law. * * *

(457-458) "If, on the other hand, it *promotes* or but incidentally or indirectly restricts competition, while *its main purpose* and chief effect are to *foster the trade* and *increase the business* of those who make and operate it then it is not a contract, combination or conspiracy in restraint of trade within the true interpretation of this act, and it is not subject to its denunciation. * * *

(462) "*It is admitted that the practice of the defendants was not only an attempt, but a successful attempt to monopolize a part of this commerce.* But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by Sec. 2 of * * *

(the Sherman Act)? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is *the very root of all competition therein.* Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself and to *exclude* others from a part of that trade, and if he may not do this he may not compete with his rivals. All other persons and corporations must cease to secure for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly.

"The purpose of the Act of July 2nd, 1890, was, however, to *prevent the stifling of competition,* not to destroy it, or foster monopoly, and any construction of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law. It is an interpretation which fosters the mischief it was passed to remedy and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and to promote the remedy. It cannot, therefore, be the true meaning of the second section of this law that every attempt to monopolize any part of interstate commerce is illegal. The act must, as the Supreme Court has twice declared * * * have a reasonable construction. The purpose of the second section is the same as that of the first—to prevent the restriction of competition—and the two sections ought to receive *similar* interpretations. The Supreme Court has declared that

the true construction of the first section is that no contract, combination or conspiracy is denounced by it unless its *necessary* effect is to directly and substantially restrict competition in commerce among the states. By a parity of reasoning, the correct interpretation of the second section must be that no attempt to monopolize a part of commerce among the states is made *illegal or punishable* by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states * * * It was not—it could not have been—the purpose or the effect of the second section of this law to prohibit or to punish the customary and universal attempts of all manufacturers, merchants and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind. * * *

(463) An attempt to monopolize a part of the interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes or but indirectly or incidentally restricts competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made and was not made illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the states."

In *Phillips vs. Iola Portland Cement Co.,* 125 Fed., 593, 594, it is said by the same judge:

"It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract,

combination or conspiracy challenged under the anti-trust law is the *direct effect* of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it *promotes*, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effects are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupation gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states."

The Supreme Court refused a *certiorari* in this case. See 192 U. S., 606.

MONOPOLY, REGRATING, FORESTALLING.

The history of it is shown in the old English textbooks: *First Russell on Crimes*:

"Monopolies are much the same offense in other branches of trade that engrossing is in provisions. * * * They are said to differ only in this, that monopoly is by patent from the King, engrossing by the act of the subject between party and party; and have been considered as both equally injurious to trades and the freedom of the subject, and therefore equally restrained by the common law.

"By the common law, therefore, those who are guilty of this offense are subject to confinement and imprisonment, the offense being *malum in se* and contrary to the ancient fundamental laws of the kingdom."

In *Blackstone's Commentaries*, Book 4, * page 159, it is said:

"Monopolies are much the same offense in other branches of trade that engrossing is in provisions; being a license or privilege allowed by the King for the sole buying and selling, making, working or using of anything whatsoever whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before."

In *First Hawkins Pleas of the Crown*, 8th Ed., p. 624:

"A monopoly is an allowance by the King to a particular person or persons of the sole buying, selling, making, working or using of anything whereby the sub-

ject in general is restrained from the freedom of manufacturing or trading which he had before. Monopoly differs from engrossing only in this: That monopoly is by patent from the King, and engrossing by an act of the subject between party and party."

Bacon's Abridgement, Title of Monopoly:

"A monopoly is described by My Lord Coke to be an institution or allowance by the King by his grant, commission or otherwise to any person or persons, bodies, politic or corporate, of or for the sole buying, selling, making, working or using of anything whereby any person or persons, bodies, politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.

"Monopoly and engrossing differ only in this: That the first is by patent from the King and the other by act of the subject between party and party; but are both equally injurious to the trade and the freedom of the subject; therefore are equally restrained by the common law."

See Justice Fields' Opinion, *Slaughter House Cases* 16th Wallace, 101.

In the *Butchers Union Case*, 111 U. S., 755, Mr. Justice Field said:

"A monopoly is defined 'to be an institution or allowance from the sovereign body of the state by grant, commission or otherwise to any person or corporation for the sole buying, selling, making, working or using of anything whereby any person or persons, bodies po-

litic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.' All grants of this kind are void at common law because they destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood, and put it in the power of the grantees to enhance the price of commodities. *They* are void because they interfere with the *liberty* of the individual to pursue a lawful trade or employment."

The Supreme Court of the United States in the *Charles River Bridge Case,* 11 Peters, 607, states that the monopoly as understood in law is

"An exclusive right granted to a few, of something which was before of common right."

Fields, J., gave the same definition in the *Slaughter House Case,* 16 Wallace, 102.

McKenna, J., in *National Cotton Oil Co.,* 197 U. S., 129, said that a monopoly is now

"understood to include 'a condition produced by the acts of mere individuals.' Its *dominant thought* now is, to quote another, 'the notion of *exclusiveness* or unity * * *"

Holmes, J., in *Northern Securities Case,* 193 U. S., 409, again emphasized the idea that monopoly was exclusion.

In the time of Lord Coke and prior thereto engrossing, regrating and forestalling were each crimes at common law,

and related to the mere necessaries of life. The reason they were held to be crimes was that the public were prevented from acquiring the *necessaries* of life at the prices fixed by the law of competition. The law embraced only the things which one went to the market to buy, and, as Blackstone says (4th Book, *158) as to *forestalling*—

> "which practices make the market *dearer* to the fair trader."

As to Regrating (4th Book, *158):

> "For this also enhances the price of the provisions. * * *"

As to Engrossing (4th Book, *159):

> "This must, of course, be injurious to the public by putting it in the power of one or two rich men to raise the price of provisions at their own discretion."

It was then to protect the public from artificial and high prices for the things they ate, and this was the reason for and the foundation of that law.

But as to the trades and occupations in life, the Courts held each Englishman (like each American) had, of right, access thereto, and, therefore, when the Crown granted a monopoly of the exclusive right to make and sell playing cards, the Court held the Letters Patent were void; not because the price of playing cards was increased, but *because* all other Englishmen were excluded from making and selling the same. It was solely on the *exclusive* feature that such grants were held void.

Strictly speaking, *forestalling, engrossing* and *regrating* were a species of crime at common law, relating solely

to the purchase and sale of provisions or the necessaries of life.

A *monopoly* was only the grant by the King of an exclusive right to carry on a certain trade which theretofore was common to all, thereby excluding all others from such trade.

They are two distinct independent offenses arising out of distinct circumstances and founded on distinct and independent reasons.

Remembering this, and also remembering that the Federal Courts look to the common law for a definition of words having there a known significance, we may at least assert that:

> Any definition such Courts give of monopoly will at least embrace the following elements:
>
> (1) The idea of exclusiveness—that one set of men exclude or keep out of a certain trade or business all other, or at least, some other men desiring to enter it;
>
> (2) That such exclusion is unlawful or is effected by unlawful means;
>
> (3) As the Sherman Act is passed avowedly to further competition, and as the very life of competition demands that the competitor who wins is lawfully entitled to the prize, that if the exclusion of others is only because of successful competition, it is not unlawful.

Pettibone vs. United States, 148 U. S., 197, 203, Chief Justice Fuller:

> "The courts of the United States * * * *resort to the common law for the definition of terms* by which offenses are designated."

Exparte Wells, 18 How., 307, 321:

"When a term is used in our Constitution or statutes which is known at the common law we look to that system for its meaning."

Crime.

Monopoly carries with it the idea of crime. To be a monopolist is to be a criminal. It denotes wrongdoing. The successful merchant who gains as the reward of competition 60 or 80 or 90 per cent. of, say, the oil trade of 1906, is not a monopolist or a wrong-doer by reason thereof, any more than the fur merchant who gains the January trade in sealskins.

Monopoly Under the Sherman Act.

The word "monopoly" has at least two meanings: the one is that which includes lawful monopolies, such as patents—a trade governed by a secret process for making the article of commerce: or a temporary control of the market in any one line gained by lawful means under competition. The other and *invidious* sense is the control or engrossing of the market by unlawful means. In either case, except perhaps a patent, the basis of monopoly is contractual.

Every trader, like every professional man, monopolizes a certain portion of the trade or profession; that is, he has the exclusive use and control of that certain portion, and he allows no one to interfere with that exclusive use and con-

trol if he can help it, and this is a necessary law of trade, without which trade could not be carried on.

But the Sherman Act does make an attempt to monopolize

> "any part of trade or commerce among the several states"

a misdemeanor. Literally carried out and giving a broad meaning to the word "monopoly," as it was argued in the Trans-Missouri and the Freight Association cases, would include every act of a trader in the acquisition of any part of the trade or commerce among the several state. Its literal construction, therefore, is impossible.

The title of the act is to protect trade and commerce and to protect them against

"unlawful restraints and monopolies."

A construction of Section 2 which literally enforced each of its words would not protect, but destroy interstate trade, and would prevent ordinary corporations and partnerships and individuals from engaging in the same, because each man who enters that trade does seek to exclusively seize some portion of it.

In the *Joint Traffic Association cases,* 171 U. S., 566, the Court said that the argument had been pressed that the Sherman Act literally construed

> "limits the freedom and destroys the property of the individual * * * and that ordinary contracts and combinations which are at the same time most indis-

pensable, have the effect of somewhat restraining trade and commerce, although to a very slight extent, but yet under the construction adopted they are illegal."

The court, on page 567, calls attention to the numerous instances of the organization of mechanics and their business, the formation of a corporation by several, a contract of partnership, the purchase by one wholesale merchant of the product of two producers, etc.

All these were cited by counsel as in support of the proposition that all restraints of trade were declared illegal under section one of the Sherman Act, and that such scope would include the simplest kind of trade. The court answered (567):

"* * * the formation of corporations for business or manufacturing purposes has never to our knowledge been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer restrained commerce or trade within any legal definition of that term. And the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act. * * * In *Hopkins vs. United States,* decided at this term (Post, 578), we say that the statute applies only to those contracts whose direct

and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of Congress must have a *reasonable construction* or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely some bearing upon interstate commerce and possibly to restrain it.' To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned or by any other decision of this court."

TEST OF MONOPOLY.

It is respectfully submitted that the test as to whether a combination has created a monopoly in interstate trade and restrained interstate trade is this: Has the combination gained by using unlawful means—not whether here or there in a vast business, improper things have been done,—but were the improper things the prevailing, controlling, and practically exclusive means by which a monopoly was gained.

If this is not proven, (as it is not,) then the inquiry ends.

Assume arguendo that it is proven, then the next inquiry is, Were the defendants doing unlawful things when the petition was filed? If so, but only if so, as to those unlawful things then being done, an injunction will issue.

RESTRAINT OF TRADE.

The contracts or combinations in restraint of interstate and foreign trade or commerce denounced in the first section of the Sherman Act are contracts or combinations between independent persons or corporations, actually competing with one another, whereby such competition is avoided, prices controlled, profits unduly enhanced, etc.

(X) What one man may lawfully do, two or more may join him in so doing, and the result is just as lawful as if done by one. If the thing done is unlawful even though done by one, it may not be of itself a crime —but if two or more unite in doing the same unlawful thing, this may constitute a crime.

But a lawful thing that one may do is not made unlawful or criminal merely because several join in so doing.

In *MacAuley vs. Tierney,* 19 R. I., 225, the Supreme Court of Rhode Island said that

> "what a person may lawfully do, a number of persons may unite with him in doing without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful."

In the *Bohn Mfg. Co. vs. Northwest Lumbermen's Association,* 54 Minn., 223, the Court said:

> "If any act be lawful, one that the party has a legal right to do, the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, "the exercise by one man of a legal right cannot be a legal wrong to another,' or, as expressed in another case, 'malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful.' *Heywood vs. Tillson,* 75 Me., 225, 46 Am. Rep., 373; *Phelps vs. Nowlen,* 72 N. Y., 39, 28 Am. Rep., 93; *Jenkins vs. Fowler,* 24 Pa., 308."
>
> "What one man may lawfully do singly, two or *more may lawfully agree to do jointly. The number*

who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case."

This principle is reaffirmed in *State vs. Duluth Board of Trade, Minn.,* 121 N. W., 395, 411 (May, 1909).

National Protective Association vs. Cumming, 170 N. Y., 315, 58 L. R. A., 135, 138:

"Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act."

Martens vs. Reilly, 109 Wis., 464, 472:

"*An act legal in itself,* in that it does not offend against the criminal law and the injuries are *damnum absque injuria,* regardless of its violation of moral standards, whether such act be the one perpetrated or the means used to that end, *generally, if not the subject of*

a civil action for damages when done by one person, is not if done by many acting in concert."

Collins vs. American News Co., 34 N. Y. Misc., 260, 263.

The Court said as to a combination of publishers to cut off the supply of a customer:

"What any publisher could lawfully do individually all the publishers may lawfully combine to do."

Vegelahn vs. Guntner, 167 Mass., 92, 35 L. R. A., 722, 727. Holmes, J.:

"But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle. *Com. vs. Hunt,* 4 Met., 111, 38 Am. Dec., 346; *Randall vs. Hazelton,* 12 Allen, 412, 414. There was combination of the most flagrant and dominant kind in *Bowen vs. Matheson,* and in the *Mogul S. S. Co. Case,* and combination was essential to the success achieved. But it is not necessary to cite cases. It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the

fundamental axioms of society, and even the fundamental conditions of life, are to be changed."

COMPETITION.

The means for the acquisition of trade which the law gives to every citizen of the United States and every one engaged in interstate commerce, is competition. Competition, the law says, increases trade, and everyone who is a citizen of the United States may use competition to acquire a portion of the interstate trade. The word itself carries its meaning—no definition of it makes it clearer or adds to the ideas which the word itself suggests. It denotes strife—struggles with others. It means warfare for the same thing, and the end sought is that for which all strive.

Webster defines *competition*:

"The act of seeking or endeavoring to gain what another is endeavoring to gain at the same time;—
"Common strife for the same object."

The strife is always to own exclusively the thing sought after and to own it, possess it to the exclusion of all other persons. If it be a prize, *i. e.*, a silver cup, I take it home as its sole exclusive owner, and no one may touch it unless I permit. If it be the intangible thing called business or trade among a dozen competitors, more than one may win a portion of it, but yet each strives for the whole, and the law does not limit the extent of the reward for each. The business or trade thus fought for is not a stationary, tangible thing like a silver cup; it is always in motion; it is the spring trade or the fall trade or the summer or winter trade, as it may be. Now there are

100 customers whose trade is sought for, and now 500. The customers themselves change. The locations of the customers vary, now here, and now there. Even in any one branch of trade, as, say the oil trade, now one sort of the product is demanded and now another. To compete for this trade is not *regrating* or *forestalling* or *engrossing* the village market for the necessaries of life.

These and many other characteristics of interstate trade in oil and business prove that its control of to-day does not insure such control next week, and he who wins, and therefore exclusively controls the spring trade, has not won the fall trade, and the danger of a monopoly is rendered less imminent and not dangerous so long as the doors of competition are not locked. Leave them open, and the law of trade corrects seeming errors.

Competition knows no limit except that the means used must be lawful. Academic treatises which talk of *unfair* competition and *undue* competition and *unreasonable* competition find no authority in the settled decisions of England or of this country. Each individual's fundamental right is to compete for all the interstate trade if he so elects. His liberty so to do is not restricted by saying that he must use in the competition fair or reasonable skill or ingenuity or means of warfare. How could the law measure and define what was fair, what reasonable and what undue? God gives to one man unusual skill and aptitude in some branch of trade—or in many branches—say, like Edison. To limit him is to deny to the world at large the manifold advantages of his skill and ingenuity. Such skill will in a large degree give to him temporarily the control of whatever branch of trade he enters, but if honestly acquired, the law awards it. He may use any means which does not infringe upon the legal rights of his fellow citizens. If he uses any means which interferes with such right, this is unlawful, and he may not use it. But aside

from this limitation, the choice of weapons and of means, is his own; the war is on, and each competitor may use all means which his wealth, his connections, his study, his superior skill or knowledge may give him.

Awards of Competition.

The law not only allows, but it awards, and by all means protects the winner in the acquisition and use of the prize he gains by competition. No matter how great the prize is, the law allows it and protects it because, unless that be so, competition would fail, for if the man who enters the lists and wins at the combat is not entitled to the trophy, there would be few lists organized and few men would submit themselves to the work and the labor and the inconvenience of the strife. Trade would be meaningless, and the incentive to industry and perseverance would be destroyed.

However large a percentage then of interstate trade the individual or the combine or the corporation or the trust may gain, even though it should exceed eighty per cent., such does not create a monopoly in violation of the Sherman Act unless *unlawful* means have been used to gain that result.

In *United States vs. Freight Association,* 166 U. S., 290, 337, Mr. Justice Peckham quoted with approval the language of Judge Shiras' dissent from the decision of the Circuit Court of Appeals:

> "Competition, free and *unrestricted,* is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition, the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils,

the law of competition remains as a controlling element in the business world."

In *Allen vs. Flood,* L. R., 1898, App. Cas. 1, 166, a case before the House of Lords, Lord Shand said the right to trade is subject to

"competition which in itself is *lawful,* and which cannot be complained of where no *unlawful means* have been employed,"

and defined unlawful means as

"improper means, by which I mean he used either *fraud* or *violence."*

In *Commonwealth vs. Hunt,* 4 Metc. 111, 134, Chief Justice Shaw said:

"Associations may be entered into the object of which is to adopt measures that may have a tendency to impoverish another—that is, to diminish his gains and profits, and yet, so far from being criminal or unlawful, the object may be highly meritorious and public spirited. *The legality of such an association* will therefore depend upon the *means to be used* for its accomplishment. If it is to be carried into effect by fair or honorable and *lawful means,* it is, to say the least, innocent; if by *falsehood or force,* it may be stamped with the character of conspiracy."

It would seem that this should be the rule. Its only limitation is *unlawfulness.* It could not be *free* and *unrestricted* if it were limited by *fair* or *due* or *reasonable.* It could not be full and free if it were limited by fair or due or reasonable.

Martel vs. White, 185 Mass. 255, *infra.*

If you say that the limitation of competition is that which is unlawful, you have a definite, clear boundary defined. If you say, however, that the competition must be fair and the competition must be reasonable, who will determine what is fair and what is reasonable? Will each jury in each case have its own standard? Will each judge in each case set up his separate standard? If so, how can the trader regulate his competition, and how can he tell what he may do tomorrow in endeavoring to capture for himself a portion of, say, the summer trade?

Citizens Light, Heat & Power Company vs. Montgomery Light & Water Power Company, 171 Fed. 553 (July 22, 1909):

> "At common law a trader, or person in other callings in order to get another man's customers, could use *any means not involving violation of the criminal laws, or amounting to 'fraud,' 'duress,' or 'intimidation,'* as the law understands and applies those terms to transactions between man and man, or to his becoming a wrongful party to a breach of another man's contract. The trader may boast untruthfully of the merits of his wares, so long as it does not take the form of false statements, amounting to slander or wilful misrepresentation of the quality of a rival product, or a libel upon the character, business standing, and credit of his rival, or an effort to induce the public to believe that the product he sells is that manufactured and sold by the rival. He may send out circulars, or give information verbally, to customers of other men, knowing they are bound by a contract for a definite term, although acting upon the expectation and with the pur-

pose of getting the trade of such persons for himself. He may use any mode of persuasion with such a customer, keeping within the limitations stated, which appeals to his self-interest, reason, or even his prejudices. He may descant upon the extent of his rival's facilities compared with his own, his rival's means, his insolvency, if it be a fact, and the benefits which will result to the customer in the future from coming to the solicitor rather than remaining where he is. *He may lawfully* at least so far as his rival is concerned, *cut prices*, to any extent, to secure his trade. So long as what he does is done to benefit his own trade and, in taking over the customers of another, he keeps within the limitations heretofore defined, he is safe from legal restraint at the instance of a competitor in following 'the law of competition,' which takes little note of the ordinary rules of good neighborhood, or abstract morality. The person whose customers are thus taken from him cannot complain, for no right of action lies in his favor against him who solicited his customer, since the solicitor exercised a legal right in a legal way, and the exercise of a legal right in a legal way, for a lawful purpose, will not give a cause of action."

(p. 562):

"* * * *all competition, more or less, diminishes, restrains, or restricts the trade of others.* * * *"

(p. 563):

"* * * *At the common law all competition in trade conducted within the limits of the law, was 'reasonable competition. Mogue Steamship Co. vs. McGregor, supra.* The *'control'* of a pursuit or trade in a locality is not forbidden by the Constitution, though it be *lodged in a single hand, if that be the result of compe-*

tition waged by lawful means. Such a monopoly is not an unlawful monopoly. Contracts or agreements between two or more persons to obtain such a result, or to keep up prices, are, of course, unenforceable, and statutes frequently make them not only illegal, but criminal; but fiercely waged competition between rivals, within the limits of the law, may bring about just such results. The law does not condemn them, for they are, in the nature of things, the inevitable results of the 'reasonable competition,' which the Constitution secures to all alike. If, as we have seen, one of these competing companies, keeping within lawful means, may continue to compete with the other until it drives it out of business altogether, and thus lawfully secures a monopoly to itself, advertisement in the newspapers or in other ways, of a purpose to continue the struggle until that result is secured, cannot make that an unlawful monopoly, which without that announcement would be lawful."

In *National Protective Association vs. Cumming,* 170 N. Y., 315, 58 L. R. A. 135, 142, Chief Justice Parker said:

"A man has a right, under the law, to start a store, and to *sell at such reduced prices that he is* able in a short time *to drive the other storekeepers* in his vicinity *out of business,* when, having possession of the trade, he finds himself soon able to recover the loss sustained while ruining the others. Such has been the law for centuries. The reason, of course, is that the doctrine has generally been accepted that *free competition is worth more to society than it costs,* and that *on this ground the infliction of damages is privileged. Com. vs. Hunt,* 4 Met., 111, 134, 38 Am. Dec., 346. Nor could this storekeeper be prevented from carrying out

his scheme because, instead of hiding his purpose, he openly declared to those storekeepers that he intended to drive them out of business in order that he might later profit thereby. Nor would it avail such storekeepers, in the event of their bringing an action to restrain him from accomplishing their ruin by underselling them, to persuade the trial court to characterize the notification as a 'threat,' for on review the answer would be, '*A man may threaten to do that which the law says he may do,* provided that, within the rules laid down in those cases, his motive is to help himself."

The unlawful competition was outlined by Lord Bowen in the Mogul Steamship Case, 23 Q. B., Div. 614, as fraud, misrepresentation, intimidation, violence, molestation. He scouted the idea of fair or reasonable competion.

(This case is quoted at length in the Appendix, p. 32).

Montgomery Ward & Co. vs. South Dakota Retail Association, 150 Fed. 413, 417.

A number of retail dealers organized an association and agreed not to purchase merchandise from wholesalers who sold to mail order houses.

They sent circular letters to wholesalers requesting them not to sell to mail order houses, and also circular letters to their own members informing them of the wholesalers who refused to comply with their request.

It was held that the plaintiff, who conducted a mail order business, was not entitled to enjoin the defendant from committing these acts, the court saying:

> "It must be remembered that the retail dealers and complainant are *competitors* in business, and that the retail dealers have committed the acts shown by the evidence, for the purpose of protecting their own interests, so that the retail dealers do not stand in the position that a combination of persons would who had no interest of their own to protect."

United States vs. Atchison, T. & S. F. Ry. Co., 142 Fed. 176, 184; Phillips, District Judge:

> "The statute, by no expression or implication, interdicts the *increase* of a railroad's business by any *competition, however energetic, eager or grasping.* The essence of the charge in the bill of complaint is that the defendant, by carrying in fact at a rate below that established and published, tried to get all the transportation it could of the designated products. In the Trans-Missouri here touching the Sherman Act, it seeks to enjoin the defendant from doing the very act which, in the Trans-Joint Traffic Association Cases the reasoning of the court was that the agreement there involved directly tended to obstruct free competition. By the portion of the bill Missouri Joint Traffic case, the court held to be unlawful in repressing."

Lough vs. Outerbridge, 143 N. Y., 271, 283: O'Brien, J.:

"*This means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met and when it disappeared to resume the standard rates,* which, upon the record, did not at any time exceed a reasonable and fair charge. *I cannot perceive anything unlawful or against the public good in seeking by such means* to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines. On this branch of the argument the remarks of Lord Coleridge in the case of the *Mogul S. S. Co. vs. McGregor, supra,* are applicable: 'The defendants are traders with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a right to push their lawful trades by all lawful means. They have a right to endeavor, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable offers customers to deal with them exclusively rather than with their rivals. There follows that they may, if they see fit, endeavor to induce customers to deal with them *exclusive by giving notice that* only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted by those who withdraw them on the customers who decline to deal exclusively with them dealing with other traders."

Bohn Manufacturing Co. vs. Northwestern Lumbermen's Association, 54 Minn., 223. 21 L. R. A., 337, Mitchell, J.:

(339)

"Now, when reduced to its ultimate analysis, all that the retail lumber dealers, in this case, have done, is to form an *association* to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other non-dealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these:

They agree among *themselves* that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale."

(339-340)

"1. The mere fact that the proposed acts of the defendants would have resulted in plaintiff's loss of gains and profits, does not, of itself, render those acts unlawful or actionable. That depends on whether the acts are, in and of themselves unlawful. 'Injury,' in its legal sense, means damage resulting from an unlawful act.

Associations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlawful, they may be highly meritorious. *Com. vs. Hun,* 4 Met. 111, 38 Am. Dec. 346; *Mogul S. S. Co. vs. McGregor,* L. R. 21 Q. B. Div. 544.

"2. If any act be lawful, one that the party has a legal right to do, the fact that he may be actuated by an *improper motive* does not render it unlawful. As said in one case, 'the exercise by one man of a legal right cannot be a legal wrong to another,' or, as expressed in another case, 'malicious motives make a bad case worse, but they cannot make that wrong which, in its own

essence, is lawful.' *Heywood vs. Tillson,* 75 Me. 225, 46 Am. Rep. 373; *Phelps vs. Nowlen,* 72 N. Y. 39, 28 Am. Rep. 93; *Jenkins vs. Fowler,* 24 Pa. 208. * * *"

"4. What one man may lawfully do singly, two or *more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful.* The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case."

Macauley Brothers vs. Tierney, 19 R. I., 225, 37 L. R. A. 455:

The members of a national association of plumbers agreed not to buy from wholesale dealers who sold to plumbers who were not members, and sent notices to this effect to all wholesale dealers.

The Court held that these acts did not constitute an unlawful conspiracy, following the Mogul Steamship Case.

Chief Justice Matteson said: (459)

"The cause and excuse for sending of the notices, it is evident, was a selfish desire on the part of the members *of the association to rid themselves of the competition* of those not members with a view to increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse, in legal contemplation for the sending of the notices? We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of *diverting trade from a rival,* and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to *stifle competition.* Trade should be *free and unrestricted;* and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which *fraud, misrepresentation, intimidation, coercion, obstruction* or *molestation* of the rival or his servants or workmen, and the procurement of violation of contractual relations, are instances. * * *

(461) *"To maintain a bill on the ground of conspiracy it is necessary that it should appear that the object relied on as to the basis of the conspiracy, or the means used in accomplishing it, were unlawful. What a person may lawfully do, a number of persons may unite with him in doing,* without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful. The object of the members of the association was to free themselves from the competition of those not members, which, as we have seen, is not unlawful. The means taken to accomplish that object were the

agreement among themselves not to deal with wholesale dealers who sold to those not members of the associations, and the sending of notices to that end to the wholesalers. This, as we have also seen, was not unlawful. Hence, it follows that, as the object of the combination between the members of the association was not unlawful, nor the means adopted for its accomplishment unlawful, there is no ground for the charge of conspiracy, and the fact of combination is wholly immaterial."

West Virginia Transportation Co. vs. Standard Oil Co., 50 W. Va. 611, 56 L. R. A. 804, (1900).

The plaintiff corporation, engaged only in transporting oil by means of pipe lines, brought an action of tort against the Standard Oil Company. The first count of the declaration charged that the Standard Oil Company had procured the construction of a pipe line through the territory which had formerly patronized plaintiff, and had refused to purchase or refine or receive in its pipe lines any oil shipped through plaintiff's line, thereby ruining plaintiff's business and securing a monopoly of the business of refining and transporting oil. A demurrer to this count was sustained. A second count alleging in substance that the defendants conspired to destroy plaintiff's business, without showing the justification of competition for plaintiff's acts, was held not demurrable.

Brannon, J., said: (807, 809, 810)

"There is no right better established under the law *of business than the right of trade competition. Mogul S. S. Co. vs. McGregor*, L. R. 21 Q. B. Div. 544, L. R., 23 Q. B. Div. 598.; *Huttley vs. Simons* (1898), 1 Q. B. 181. These companies were owned by the same men. Their interests were common—one buying, refining and selling oil; the other transporting it. I mean the de-

fendant companies. Had they not a right to *work together to promote the common interests*—even to *conspire to draw to themselves from* other competitors' business, so they did no unlawful act? The count charges an arrangement designed to form a monopoly to control or dominate the business of purchasing, producing, refining and selling oil. Everyone has a right to enlarge his business, even though, by means of greater capital, superior facilities and capacity he monopolizes business and injure competitors. If the business is lawful, so that it violates no state law, even if it overshadow others, who can prevent it in a *free country of constitutional law?*

* * * * * *

(810) "Now these companies were furthering their own interests in lawful competition with others. If they possessed the lawful right above stated, what matters it that they did have the intent to cut down the business of others, or that they did cut it down and injure others, though they did this that they might themselves fatten? So far this first count charges only the exercise by the defendants of a right of constitutional liberty, accorded alike to all—simply the right of self-advancement in legitimate business—self preservation, we may say. That in these days of sharp, ruinous competition some perish is inevitable. The dead are found strewn all along the highways of business and commerce. Has it not always been so? Will it always be so? The evolution of the future must answer. What its evolution will be in this regard we do not yet know, but we do know that thus far the law of the survival of the fittest has been inexorable. * * *

"I understand the law to be as follows: One may without liability induce the customers of another to withdraw their custom from him, in the race of competition, in order that the former may

himself get the custom, there being no contract; and it is no matter that such party is injured, and it is no matter that the other party was moved by express intent to injure him; motive being immaterial where the act is not unlawful. But where the act is not done under the right of competition, or under the cover of friendly, neighborly counsel, but wantonly or maliciously with intent to injure another, it is actionable, if loss ensue. Nor is it material in the latter case that there was no binding contract between the business man and his customers. He cannot interfere even for his own benefit, if there is a contract."

Martell vs. White, 185 Mass., 255, 64 L. R. A., 260, 263, 1904, Hammond, J., said:

"The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the *general and natural* laws of business to have their *full and free operation*, and that this end is best attained when the trader is allowed, in his business, to make *FREE use* of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or, in the words of Bowen, L. J. in the Mogul S. S. Case, L. R. 23 Q. B. Div. 615, may adopt the 'expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away, to reap a fuller harvest of profit in the future.' In these and many other obvious ways he may secure the customers of his rival, and build up his own business to the destruction of that of others; and, so long as he keeps within the operation of the laws of trade, his justification is complete."

In *Vegelahn vs. Guntner,* 167 Mass., 92, 1906, Mr. Jus- Holmes said:

"* * * the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged. *Commonwealth vs. Hunt,* 4 Met. 111, 134."

Allen vs. Flood, L. R. 1898, App. Case, 1, 166; Lord Shand, addressing the House of Lords, said:

"* * * a trader has a right to trade without hindrance. That right is subject to the right of others to trade also, and to subject him to competition—*competition, which is in itself, lawful*—and which cannot be complained of where *no unlawful means* (in the sense I have already explained) have been employed. The matter has been settled insofar as competition in trade is concerned by the judgment of this House in the Mogul Steamship Co. Case."

His Lordship had defined illegal means, on page 162, as "*improper means,* by which I mean that he (the defendant) used neither *fraud* nor *violence.*"

In *Ajello vs. Worsley,* 1898, 1 Ch. 274, 280, Mr. Justice Stirling said, that a seller

"* * * is entitled to make the offer at any price he chooses, whether remunerative or not; it may *be worth a trader's while to sell* some goods at a loss so long as he is able to sell other goods at a countervailing or more than countervailing profit."

The effect of the late English decisions is thus summarized by Sir Frederick Pollock in his treatise on the Law of Torts (8th Ed.) page 152:

> "A trader can complain of his rival only if a definite exclusive right, such as a patent-right, or the right to a trade-mark, is infringed, or if there is a wilful attempt to damage his business by injurious *falsehood* ("slander of title") or acts otherwise *unlawful* in themselves. Underselling is not a wrong, though the seller may purposely sell some article at unremunerative prices to attract custom for other articles; nor is it a wrong even to offer advantages to customers who will deal with oneself to the exclusion of a rival.
>
> "To say that a man is to trade *freely*, but that he has to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract their business to his own shop, would be a strange and impossible counsel of perfection.
>
> "To draw a line between *fair and unfair* competition, between what is reasonable and unreasonable, *passes the power of the courts.* Competition exists where two or more persons seek to possess or enjoy the same thing. It follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition. There is 'no restriction imposed by law on competition by one trader with another with the sole object of benefiting himself.'"

RIGHTS OF CITIZENS OF THE UNITED STATES.

It is the right of every citizen of the United States to engage in interstate commerce, and to use all lawful and legitimate means to gain so much of that interstate trade as he or his partnership or corporation may. It is one of the natural indefeasible rights of an American citizen so to do.

The Constitution itself was framed, among other things, "to secure the blessings of liberty to ourselves and our posterity."

The Declaration of Independence declared
"as self evident"
truths
"that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."

Article 4, section 2, provides that:
"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The Fifth Amendment provided that,
"No person shall be * * * deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment added:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The courts have construed these provisions as giving to each citizen the fundamental privileges and immunities which belong of right to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several states. Among these fundamentals are the right of a citizen of one state to pass through or to reside in any other state for the purposes of trade; to take, hold, use and dispose of property.

Each citizen is entitled to protection by the Government in his enjoyment of life, property and liberty, and this includes the fundamental right to engage in interstate trade.

In the *Slaughter House Cases*, 16 Wallace, 116, Mr. Justice Bradley said:

"The rights of life, liberty and pursuit of happiness are equivalent to the rights of life, liberty and property. * * * For the preservation, exercise and enjoyment of these rights the *individual citizen as a necessity must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect, and a calling when chosen is a man's* PROPERTY *and right.* Liberty and *property* are not protected where these rights are arbitrarily assailed."

In *Thomas vs. Cincinnati Ry. Co.*, 62 Fed. Rep., 803-819, Judge Taft said:

> "Every man, be he capitalist, merchant, employer, laborer or professional man, is entitled to invest his capital, to carry on his business, to bestow his labor, or to exercise his calling, if within the law, according to his pleasure. Generally speaking, if, in the exercise of such a right by one another suffers a loss, he has no ground of action. Thus, if two merchants are in the same business in the same place, and the business of the one is injured by the competition, the loss is caused by the other's pursuing his lawful right to carry on business as seems best to him. In this legitimate clash of common rights, the loss which is suffered is *damnum absque injuria.*"

Conner vs. Elliott, 18th Howard, 591;
Ward vs. Maryland, 12th Wallace, 418;
The Slaughter House Cases, 16th Wallace, 36;
Cooley's Const. Lim., p. 37 and notes.

Each citizen is, of course, subject to the police laws of the State, and also to the laws of Congress regulating commerce; and while the division line between the power of Congress to regulate and the right of the citizen to pursue interstate commerce is not easily defined, yet it is still true that this power of Congress must be used consistently with the recognition of the rights of the citizen to his fundamental and indefeasible rights above noted.

Monongahela Navigation Co. vs. U. S., 148 U. S., 312.

It is true that under the Sherman Act the Supreme Court of the United States has held in the Trans-Missouri and the Joint Traffic Association Cases that to some extent Congress could restrict, for the good of interstate commerce, the liberty

of the citizen to contract, but it is respectfully suggested that that restriction of the liberty of the citizen was in the nature of the restraint of an unlawful thing; *i. e.,* Congress has an undefined but most extensive power of regulating interstate commerce, and the citizen cannot, by his contract, agree with some other citizen to restrain that regulation, and the contract that so restrains is *ipso facto* void, and *therefore* illegal; and Congress may so declare, and this because the very subject matter of the contract puts it pecularily within power of Congress to regulate if it deems proper. The contract invades the territory of Congress, and hence subjects itself to Congressional regulation in the nature of the police laws.

The indefeasible right of the citizen to engage in interstate commerce is not denied, but, like his holdings of property in the state, it is subject to the police laws as to property in the State, is subject to the laws of Congress as to the regulation of the use of this acknowledged right. No hard and fast line can be drawn to determine the boundary line between the indefeasible right of the citizen to engage in the trade and the power of Congress to regulate and control, and to some extent, restrain; but it is still indisputably true that both of these rights exist, are related to each other, have equal recognition in the Federal Constitution, and must receive reasonable treatment and recognition by the Federal Courts and Congress, and that Congress has not as yet restricted the percentage of interstate or foreign trade which any citizen of the United States may control.

Uses of Property.

The right of the citizen to be protected in his property includes all the elements which go to make it up. Thus the *use* of property is an essential element of ownership. Indeed, the property is of value only as one may use it. If one be re-

stricted in its use—be prevented from using it—as he sees fit, his rights and property would amount to little and his liberty be controlled.

Slaughter House Cases, 16 Wall., 36, 127:

"The right of property includes the power to dispose of it according to the will of the owner."

THE FREEDOM TO USE AND SELL INCLUDES THE METHODS OF HOLDING TITLE WHETHER AS TENANTS IN COMMON OR JOINT TENANTS OR MERELY AS CESTUIS QUE TRUSTENT.

Congress cannot constitutionally prohibit individuals from uniting to secure community of interest, and in the Sherman Act has not attempted to prohibit individuals from uniting to secure community of interest in carrying on business.

In re Greene, 52 Fed., 104, Judge Jackson:
(p. 115).

"It is very certain that Congress could not and did not, by this enactment, attempt to prescribe limits to the acquisition, either by private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the *accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein,* or any part thereof, among the states, a criminal offense was committed by such owner or owners. * * * (p. 112) Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use, and dispose of prop-

erty. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. *But Congress certainly has not the power or authority under the commerce clause, or any other provision of the constitution, to limit and restrict the right of corporations created by the states, or the citizens of the states, in the acquisition, control and disposition of property.*"

Northern Securities Co. vs. United States, 193 U. S., 19, 361, Brewer, J.:

"Further, *the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen.* If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any acts of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall vs. Great Northern Railway,* 161 U. S., 646, in which this court said (p. 671), in reference to the right of the

stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Railway Company: 'Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common.'"

In *Smiley vs. Kansas*, 196 U. S., 447, Mr. Justice Brewer said (456-457):

> *"Undoubtedly there is a certain fredom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests,* and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. But a secret arrangement, by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed, *without any merging of interests through partnership or incorporation*, is one to which the police power extends."

Here is the assertion that two or more competitors in PRIVATE trade may unite and form a partnership or corporation, and as such partnership or corporation for the future carry on trade. These are rights of citizens of the United States.

(See additional authorities in Appendix, p. 8).

ANALYSIS OF THE SHERMAN ACT.

(For the text of the Act see Appendix, page 1).

The Sherman Act in its first section is directed to the contract, the combination, the conspiracy in restraint of trade or commerce among the several states. It is every contract, every combination, whatever may be its form, and every conspiracy in restraint of commerce. It will hardly be denied that the contract then is the basis of the thing which section one of this act is directed against. The combination necessarily implies a contract or agreement among those who form it, and the very basis of the conspiracy is the breathing or agreeing together to do a certain thing. It would seem then to be reasonably clear that what Congress meant by this section was to strike at contracts either made directly and formally, as in writing, and called a contract, and made by but two or several, or the larger form of a contract where twelve or more agree with each other to do a cetrain thing, and called a combination or conspiracy. The combination under section one is evidently the same as the conspiracy, because, if the combination, whatever be its form, is in restraint of trade, and only such combinations are prohibited, then the act declares it to be illegal, and therefore the combination itself is a conspiracy.

One person could not make a contract—or form a combination—or conspiracy. It at least would require two or more.

This is emphasized by the further words in section one, "in the form of trust or otherwise."

It does not say in the form of a corporation, but of

"a trust."

This was the combination where many joined in restraint of interstate trade. But one person could not form a trust; a number may, and the trust may consist of individuals and corporations. But a single corporation cannot make a trust in its popular meaning any more than a single person. Under section 8 the word *"person"* does include a corporation, but only as it includes an individual.

It seems clear, then, that the corporation is not hinted at, much less prohibited by section one. That it is a corporation, big or little, does not make it a *trust*, and Congress did not say so or mean to say so by the language used.

So far we emphasize the fact that not only does not the Sherman Act prohibit corporations or trusts or combinations, but it really authorizes their existence and participation in trade.

In the *United States vs. Joint Traffic Association*, 171 U. S., 567, Mr. Justice Peckham said:

> "* * * we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership."

In *Smiley vs. Kansas*, 196 U. S., 447, Mr. Justice Brewer said) 456-457):

> "But a secret arrangement by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed, *without any merging of*

interests through partnership or incorporation, is one to which the police power extends."

National Cotton Oil Company vs. Texas, 197 U. S., 115, 128, McKenna, J.:

"There are some things which counsel easily demonstrate. They easily demonstrate that *some combinations* of capital, skill or acts *is necessary* to any business development, and that *the result must inevitably be a cessation of competition.*"

Chesapeake & Ohio Fuel Company vs. United States, 115 Fed., 610, 620, Day, Circuit Judge:

"Looking then to the contract in question, we find fourteen of the coal producers of this district, whose aggregate production is 5,000 tons a day, entering into an agreement which *without making a partnership,* undertakes to control the entire output of the several mines."

Northern Securities Co. vs. United States, 193 U. S., 197, 410, Holmes:

"*A partnership is not a contract or combination in restraint of trade* between the partners unless the well known words are to be given a new meaning invented for the purpose of this act."

Assuming now that the Congress used the word "illegal" in this section as equivalent to "unlawful," which is the most favorable interpretation for the Government, we find that this section 1 of the Sherman Act declares to be unlawful a contract, a combination, or a conspiracy when it is in restraint of trade or commerce among the several states.

Congress has several times in this act used the word "restraint" or "restrain;" thus you find it in section 1, "in restraint of trade," you find it again in section 3, "in restraint of trade," and twice used there. Then you find the word again used in section 4, "to restrain the violations of this act."

Webster defines the word *restraints* "The act or power of retaining or holding back or hindering from motion or action in any manner."

According to a well known rule of construction the word "restraint" then wherever used receives the same interpretation whether in the expression "in restraint of trade" or the expression "to restrain the violations of this act."

Potter's Dwarris on Statutes, page 193:

"If the same words occur in different parts of a statute or will, they must be taken to have been *everywhere used in the same sense.*"

Wheaton vs. Peters, 8 Peters, 591, 661:

"There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained as by comparing it with the words and sentences with which it stands connected."

Turning to this first section where Congress first used the word, let us look at its context to see if there can be any doubt as to its meaning.

"In restraint of trade"

seems plain enough; it is to pull back, to hinder or prevent trade. This seems also to be its plain meaning in the other paragraph. The context of the first paragraph does

not seem to vary in its meaning or throw any additional light on it, and you then come back and gather up your words, and you find that Section 1 declares to be unlawful contracts, combinations, conspiracies which actually do restrain interstate trade.

In *Hopkins vs. United States,* 171 U. S., 592, the Court said:

> "The contract condemned by the statute is one whose *direct* and *immediate* effect is a restraint upon that kind of trade or commerce which is interstate. * * * There must be some direct and immediate effect upon interstate commerce in order to come within the act."
>
> See many cases cited on pages 594-598.

In the *Joint Traffic Case,* 171 U. S., 568, the Court said that the Sherman Act

> "applies only to those contracts whose *direct* and *immediate* effect is a restraint upon interstate commerce."

Section one prohibits contracts which as a fact restrain interstate trade.

To combine or to conspire in restraint of interstate trade necessarily implies a contract or agreement so to do. There must be the breathing together, that is, the agreeing together to do a certain thing, and such agreement is a contract to do it; so that this first section relates to contracts, and really only contracts in restraint of trade. This contractual relation seems to be further shown by the expression

> "Every person who shall *make* any such contract or *engage in* any such combination or conspiracy shall be deemed guilty," etc.

The word "make" and the words "engage in" signify the same thing, the agreeing to do that which amounts to a restraint of trade.

Here the direct and formal making by two or more of a formal contract is specifically mentioned, and then the expression,

"engage in any such combination or conspiracy," follows. If I engage in a conspiracy or a combination, or I make an engagement of any kind, I enter into a contractual relation; an engagement to marry or an engagement of employment. This adds to what seems plain on the face of it, that it is the agreement in restraint of trade by two or many that is prohibited by section one. As Judge Sanborn, in this case in his opinion on the order to serve outside defendants, said, if one

> "operates with others knowing them to have the same design, *there is in fact an agreement between him and them.*"

It will not be overlooked that Congress did not prohibit combinations in trade; it, in fact, recognized their use and legality when it only made illegal those in restraint of trade.

Plainly it had before it combinations which are formed for interstate trade, and concluded that *only such* of them as were by contract restraining interstate trade are hurtful, and it therefore made only such illegal.

It thereby affirmed that combinations which do not restrain interstate trade are legal—not in violation of the law or the Sherman Act.

But, as we have seen, even more is apparent. The trust itself is not made illegal or prohibited. Only such *trusts* as by contract restrain trade. Therefore a trust even composed of corporations is not illegal unless it actually, by agreement, restrains interstate trade.

Then, too, section one only is directed against the actual restraint of trade, not the mere *attempt* to restrain. Section two makes the *attempt* to monopolize a crime, but section one does not. It is only the actual restraint it aims at, at least where private traders *only* are involved.

The language is "in restraint of trade or commerce." It is not *"to restrain,"* but *"in restraint."* That is, the contractor, combination or conspiracy actually *does restrain.* As stated, this is emphasized by the second section which makes the mere "attempt" to monopolize a crime. Now a contract may itself restrain trade, as where A and B agree that A will not refine oil. But an agreement between A and B that C shall not refine oil does not restrain C. A and B, rivals of C, all being refiners, may contract for the legitimate enlargement of their own trade to compete with C by cutting prices, etc. All lawful means to compete with C they may use, but they may not use unlawful means.

Section one is inoperative unless there is actual restraint.

Congress has the regulation of the intangible thing called commerce, and that gives it the regulation of the means by

which commerce is carried on. The transporter from one state to another does not gain title to the object transported by or through any federal law. That title is given to him by the state, not by the Federal Government. It is only when the article itself is in actual transmission from one state to another that it is subjected to the jurisdiction and control of Congress. Under the Sherman Act, then, Congress can only forbid the acts which restrain the article dealt in in its transit from state to state, and in the negotiations and bargains which lead up to its transit. Just as soon as the restraint is removed the object of the act is accomplished, and trade is left unrestrained. It is the *restraint* only and not the object itself dealt in that section one of the act prohibits.

Remove restraint and trade is free. The very purpose of the act is to protect trade and make it free; not to forbid the trade itself.

Section 6 forfeiting property used as a part of and in connection with the success of the combination is a mere penalty just as the imprisonment and fine is. It seems to have no other significance and certainly does not enlarge the jurisdiction of the court.

It certainly does not prove an intent of Congress to inquire into or regulate the ownership of the property which enters into interstate trade.

Distinction Between First and Second Sections of Sherman Act.

Section three, which extends the prohibition of the act to the territories, copies the language of section one verbatim, but not that of section two, as if section one contained the substance and was the primary definition of the offense, and sec-

tion two was only another description of the same evil, emphasizing the monopoly feature, resulting from successful combination.

In addition, a monopoly or an *attempt* to monopolize *by a single person* or corporation, is forbidden by section two, whereas a combination or contract in restraint of trade requires at least two parties. This difference was pointed out by Mr. Justice Holmes in his dissenting opinion in the *Northern Securities case* (193 U. S., at page 404), in which he compared the first and second sections as follows:

> "All that is added to the first section by section 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the states, and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of section 1 than it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man."

United States vs. Patterson, 55 Federal, 605, 640, Judge Putnam.

In *Whitwell vs. Continental Tobacco Co.*, 125 Federal 454, 462, Judge Sanborn said:

> "The *purpose of the second section is the same as that of the first*—to prevent the restriction of competition—and *the two sections ought to receive similar interpretations.* The Supreme Court has declared that the true construction of the first section is that no contract, combination or conspiracy is denounced by it unless its necessary effect is *to directly and substantially*

restrict competition in commerce among the states. By a parity of reasoning the correct interpretation of the second section must be that no attempt to monopolize a part of commerce among the states is made illegal or punishable by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states."

United States vs. American Tobacco Co., 164 Federal, 700, 727, Judge Ward:

"*The first and second sections must be read together, and I think mean the same thing,* the second adding nothing except to extend the prohobition to individuals who, without combination, monopolize or attempt to monopolize. It must be understood to prohibit monopolies or attempts to monopolize brought about by the unlawful means contemplated in the first section, viz., the purpose to restrain trade by preventing competition and preventing others from participating in it. The third section of the act bears out this construction, because it does not mention monopolies or attempts to monopolize in the territories or District of Columbia, where the jurisdiction of the United States is supreme in all things, and it can hardly be that Congress intended to declare innocent acts committed within them which it pronounces crimes if committed in the states."

Monarch Tobacco Works vs. American Tobacco Co., 165 Fed., 774, 776, 777:

"It is obvious that the two sections referred to make illegal two different, though nearly allied, things, namely, section 1 refers to combinations in restraint

of interstate trade and commerce, and section 2 refers to combinations or conspiracies to monopolize, or to attempt to monopolize, interstate trade and commerce."

Section Two of the Sherman Act.

The second section of the Sherman Act is primarily directed to the individual, while the first is primarily directed to combinations, contracts and conspiracies. To show a violation of section 2 the Government must prove an attempt to gain the exclusive control of some part of interstate trade, either say of one or more of the objects of trade or the modes of transportation of the objects or the bargain and sale of such objects, and an attempt to do this by unlawful means. While the actual ownership of a control need not be shown, yet the proof must show: (Mr. Justice Holmes, *Beef Trust*, 196 U. S., 375, 396):

(a) An intent;
(b) A tendency;
(c) An imminent probability of the creation of a monopoly.

So long as the attempt is made by lawful means which leaves open competition there is no violation of section two, even if the attempt to gain control of a large portion of the interstate traffic is successful.

As section one is directed against the contracts which, being executed, restrain trade, and is *not* primarily directed against the individual (and indeed the individual alone could not violate it), section two *is* primarily directed against the individual. It begins:

> "Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize."

It is the person, then, who may monopolize; any one individual might, this section contemplates, monopolize the interstate trade, or at least if he did not monopolize he could attempt to, and the individual who does so is deemed guilty of a misdemeanor. It is the individual who is punished and not the combine or conspirators, because this section of the act says:

> "Every *person* who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize * * * shall be deemed guilty of a misdemeanor."

The person may act singly or he may combine or he may conspire with others, but it is the *individual* who does these things that the act is directed primarily against, and it is not the combine or conspiracy. It is probably true that each one of the combine that attempts to monopolize is equally guilty with him who originated the combination, and this is equally true of the conspiracy, and it is not doubted that each and all of the persons who joined the combine or conspiracy for the purpose of and in an attempt to monopolize the interstate trade are deemed to be guilty of a misdemeanor.

The powers by the private trader to control the trade —fix its prices, etc.—if lawfully won, as by internal growth and development, and the result of legitimate competition— is NOT denounced by the Sherman Act, but is permitted, and indeed encouraged.

Thus in *Whitwell vs. Tobacco Company*, 125 Fed. Rep., 454, the Circuit Court of Appeals, Judge Sanborn delivering the unanimous opinion of the Court, said: (462)

> "It is admitted that the practice of the defendants was not only of an attempt, but a successful attempt to monopolize a part of this commerce. * * *

(463) But an attempt to monopolize a part of interstate commerce, which promotes, or but indirectly or incidentally restricts competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made and was not made illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the states."

This must follow:

(1) Each individual citizen may of right enter into interstate commerce:

(2) Free competition for that trade or commerce is not only allowed, but is encouraged:

(3) But an essential part of competition is the award following the strife. It was for that award all competitors strove. And that award was a monopoly of the whole or part of the trade which enabled him, by the control thus gained, to fix prices,—exclude of necessity some others from the trade.

And the law not only allows, but gives the winner that monopoly.

THE PURPOSE OF THE SHERMAN ACT IS TO FURTHER FREE COMPETITION IN INTERSTATE TRADE.

The only qualification is *free* competition, not reasonable competition or fair competition, but simply and only *free* competition; that is, all the means of competition that are lawful.

The authorities supporting this are unanimous and are collected in the appendix (p. 3).

V.

THE GOVERNMENT TO PROVE ITS CASE MUST SHOW VIOLATIONS OF THE FEDERAL LAW. THERE WAS NO FEDERAL LAW APPLICABLE PRIOR TO THE SHERMAN ACT.

The inquiry here is solely this: Was the Sherman Act being violated by the defendants when the petition in this case was filed?

This is a question of federal law and between the United States and citizens of the United States. It is not a controversy between a State and its citizens, and the Government cannot make out its case by appealing to State laws or showing any violation thereof. The individuals are:

1. Citizens of the United States;
2. Citizens of the State.

Each sovereign has its own distinct, exclusive field of jurisdiction. The state cannot provide for the federal rights of a citizen of the United States or punish the violation thereof, and equally the United States cannot protect the State rights of the citizens or punish the violation thereof.

United States vs. Reese, 92 U. S., 214;

See Mr. Justice Holmes to same effect

Northern Securities Case, 193, 193 U. S., 409.

United States vs. Harris, 106 U. S., 629;
United States vs. Cruikshank, 92 U. S., 542;
United States vs. Fox, 94 U. S., 315;
Logan vs. U. S., 144 U. S., 263.

The rights and duties of the defendants and the lawfulness or otherwise of their conduct, as alleged in the petition, are to be tested by federal laws only, and if the things alleged in the petition as done by the defendants prior to 1890 were not forbidden by those federal laws, the same must be regarded up to 1890 as innocuous. Whatever doubts there may be under the decisions (cases cited *infra*) as to the existence or not of any so-called federal common law, it seems certain that such federal common law could only involve acts which came under federal control by reason of the grants in the Federal Constitution to the United States Government. Article 10 of the Federal Constitution reserved it to the States. For the federal court to create by decision a Federal common law outside of and foreign to the powers granted to the Federal Government would necessarily invade the rights of the States and exceed the granted jurisdiction.

The federal courts have just the judicial power given and authorized by Article 3 of the Constitution, and such is limited to the scope of the powers granted in the Constitution to the Federal Government, except in certain specific instances like litigation between citizens of different States, etc.

For the judicial power to assume and use the power to legislate and create and enforce a federal common law on subjects foreign to the powers granted to the Federal Government would be wholly unjustified.

Especially is this the case in the regulation of interstate commerce. The power is to regulate, and it is given, not to the Courts, but to Congress. What those regulations shall be is a legislative question only. It is not judicial. The Courts are powerless to establish regulations. True the federal courts have held that in the absence of regulations by Congress it was a Congressional declaration that interstate commerce should be free, and therefore the acts by States or individuals which directly, immediately and substantially do regulate or interfere with interstate commerce are unauthorized excursions into the field of Congressional powers. But the Court always have and do still say that there is no Federal crime except by act of Congress.

We ask attention to a discussion in our appendix (p. 10) with authorities cited, as to the existence of a federal common law as to what is or is not forbidden in inter-state commerce. In cases between private parties involving property rights the federal courts use the common law of the state in which the controversy arose—as in the *Western Union Telegraph case,* (181 U. S.). When it is a question between states, as in *Kansas vs. Colorado,* (206 U. S.) the court applies international law.

But the present case does not, as between the Government and the individual defendant, involve primarily a question similar to either of the other cases.

Mr. Justice Holmes said in *Beasley vs. Texas & Pacific Railway Company,* 191 U. S., 498,

> "The very meaning of public policy is the interests of others than the parties."

The Common Law in a case like this is a rule of pub-

lic policy. It is made up of ancient statutes, traditions of the law from approved text books, and especially decisions of the courts. But in the end, as to what offends as a trade regulation, as to what is a monopoly, or what is restraint of trade, all depends on each state,— the ideas appropriately expressed for all the people of that state.

But for the court to endeavor to declare a federal public policy which would regulate inter-state commerce is to usurp the functions of Congress, to whom the people of the United States gave that express authority.

It is submitted that:

(a) The petition filed in this case relies solely and only on the Sherman Act and not on the existence of any federal common law prior to its passage.

(b) The petition charges a crime and a crime against the United States. There is no such thing as a crime against the United States unless it be so declared by Act of Congress. The Government must make out its case proving the crime under federal law only. There was no federal law making, say the Agreement of 1882 or 1879, a crime against the United States Government.

The ruling in the *Western Union Telegraph Case,* which was a controversy between citizens of different States and involved only their relative rights, is not important here. That case originated in the State Court and the State Court administered the State law and this Court approved the same.

(c) The Congress and the Federal Courts do not control or have jurisdiction over the acquisition of properties. That is left wholly to the States. Even if (which we deny) it were true, it is not a violation of any law of Congress, and especially not of the Sherman Act.

(d) The only thing which these defendants put into interstate trade and for which they compete is the trade in oil and its products. The refineries are not in interstate trade. It is the oil only and its products. The oil itself was not illegally acquired, and the Government does not so allege. How is it possible to inflict the vice, if any there be, of the acquisition of the title of the real estate to the refined oil and its products?

See also *Newport & Cincinnati Bridge Co. vs. United States,* 105 U. S., 470, 475.
Pennsylvania vs. Wheeling & Belmont Bridge Co., 13 How., 518, 581; McLean, J.
Transportation Co. vs. Parkersburg, 107 U. S., 691, 701.

There is no federal crime except such as is so made by Act of Congress, and until the Sherman Act the matters and things charged in the Petition were not federal crimes.

To what extent there is a federal common law may be now uncertain, but if such there be, it must be restricted to those things which by the Constitution are vested in the federal Government—and cannot extend to such things as the ownership of properties in a state, a regulation of such ownership, or the production or manufacture within a State of crude or refined oil.

Courts have always and still do say that there is no Federal crime unless so declared by Act of Congress.
Manchester vs. U. S., 139 U. S., 262;
North Shore Co. vs. Nicomen Co., 212 U. S., 412.

The Supreme Court ruled in *Wheaton vs. Peters,* 8 Peters, 591, 658):

> "It is clear there can be no common law of the United States."

The Federal Courts have no jurisdiction except that which is conferred by the Constitution or Acts of Congress, and cannot recognize any crime against the United States except that which has been so declared by Acts of Congress.

Cooley's Const. Lim. pp. 47-48, and notes;
U. S. vs. Hudson, 7 Cranch, 32;
U. S. vs. Coolidge, 1 Wheaton, 415;
U. S. vs. Britton, 108 U. S., 199-206.

Wheaton & Donaldson vs. Peters & Grigg, 8 Peters, 591, 658. Mr. Justice McLean said:

> "It is clear there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption. When, therefore, a common law right is asserted we must look to the State in which the controversy originated."

Holmes vs. Jennison, 14 Pet., 540, 620; Baldwin, J.

This case is cited and approved in 1909 in the case of *North Shore Boom Co. vs. Nicomen Boom Co.,* 212 U. S. 412.

(See additional authorities in appendix, page 15).

EVEN IF REFINERIES HAD BEEN ACQUIRED BY MEANS UNLAWFUL PRIOR TO THE SHERMAN ACT (WHICH WE DENY), YET THIS CANNOT INFLUENCE THE DECISION IN THIS CASE.

The Government alleges that between 1870 and 1882, the defendants, by improper means, acquired certain refineries.

The answers are several:

(a) This is denied by the Answer and is neither supported by the evidence or found by the Court.

(b) It is a matter which does not concern the Government. Our title by which we hold our joint properties is not involved in this controversy. If by any improper methods we took undue advantage of any one by which we gained this property that is a question between such person and ourselves and not between the Government and ourselves.

After an illegal contract for the acquisition of property has become executed, subsequent dealings with the property will be judged on their own merits.

Dent vs. Ferguson, 132 U. S., 50, 66.

Brooks vs. Martin, 2 Wall., 70, 80.

Plaintiffs and defendant formed a partnership to buy up soldiers' claims for public lands. After they had obtained

lands in this manner and sold them, taking notes and mortgages in payment of same, plaintiff filed a bill in equity to compel the defendant to account for the proceeds. The bill was sustained, Mr. Justice Miller saying:

> "* * * The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

In *Armstrong vs. Toler,* 11 Wheat., 258, a case is put of goods smuggled into the country; here even if the vendor knows them to be smuggled he may buy them.

> (270) "The consideration is not infected with the vice of the importation. * * * This would be to connect distinct and independent transactions with each other, and to infuse into one which was perfectly fair and legal in itself, the contaminating matter which infected the other. This would introduce extensive mischief into the ordinary affairs and transactions of life not compensated by any one accompanying advantage. * * *"

States vs. Continental Tobacco Co., 177 Missouri, 34.

In *Planters Bank vs. Union Bank,* 16 Wall., 483, 499, Mr. Justice Strong said:

> "Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had

been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds, or against the defendants or any engagement made by them to sell Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. *It is enough that the defendants have in hand a thing of value that belongs to them.* Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

Railroad Company vs. Durant, 95 U. S., 576, Swayne, J.:

"But it is said the conveyances grew out of an illegal transaction between the company and the grantors. To this there are several answers. The grantors have voluntarily executed the contract. They have not intervened and do not complain."

THE TRUST AGREEMENT OF 1882.

Position of the Government.

As stated by the senior counsel for the Government, its case in the Court below is as follows:

FIRST. The Trust Agreement of 1879 (Vilas, Keith & Chester) and the Trust Agreement of 1882—but especially the Trust Agreement of 1882—are both void at common law as being,

(a) In restraint of competition in trade and as tending to a monopoly;

(b) Against the policy of the State of Ohio; and

(c) Against the Federal common law:

SECOND. This Trust Agreement of 1882 under the control of the seven individual defendants, was practically continued until 1899 because the dissolution of the Trust in 1892 was by such method as to enable the seven individuals still to control properties:

THIRD. When these properties in 1899 were conveyed to the Standard Oil Company of New Jersey, this also was a continuation of the Trust, and in itself was, in addition, the creation of a combination in restraint of trade and tending to a monopoly:

FOURTH. That under the corporate existence, this still continues.

In this mode of reasoning, it is apparent that the whole argument rests on two propositions:

(1) Were the Trust Agreements of 1879 and 1882 void at common law and under the federal common law?

(2) Was the conveyance to the Standard Oil Company of New Jersey in 1899 a restraint of trade and a monopoly in violation of the Sherman Act?

TRUST AGREEMENT OF 1882.

We propose to consider:

(1) Was the trust agreement of 1882 illegal at common law?

(2) Assuming it to be so illegal, was it prior to the Sherman Act illegal under federal law, statutory or common?

(3) Assuming it was so illegal, did the fact of the conveyance of the same properties in the trust in 1899 to the Standard Oil Company *per se* and of itself, and without further action, make such Standard Oil Company ownership after the conveyance, a direct, substantial, immediate restriction of interstate trade and directly, immediately and substantially tending to monopoly?

Was the trust illegal at common law?

The test of whether a trust formed by individuals is lawful is—is it formed for a lawful purpose? Any particular trust may also involve the question of corporate power, i. e., the corporations joining may not have the power so to do—and as the act is *ultra vires* it may be a ground of forfeiture by the state of the particular charter in question.

On this ground also the Sugar Trust—the Standard Oil Company of Ohio, and other cases were founded.

But it is evident such reason affords no assistance in answering the question. Aside from this corporate question, is such a trust void at common law?

In each one of the cases cited, the thing which made the Trust obnoxious to the law was that the court said in each case the *purpose* and direct and necessary effect of it was to *eliminate competition* and *form a monopoly.* No one of those cases held that a Trust *per se* and of itself, formed for a lawful purpose, was forbidden at common law, and much less is it by the Sherman Act.

In every one of these cases cited the question was one of corporate power, i. e., whether the thing done was not beyond the power of the corporation *ultra vires* and therefore a ground for forfeiture of the particular charter, and in each case it was held to be so.

(See our discussion of such cases in our appendix, p. 20).

The Sherman Act does not pretend to, indeed could not, regulate the methods by which citizens should hold their titles. This is undoubtedly a question belonging to the states.

Now the facts in our case as in part found by the court below, were very briefly these:

(1) The petition charges and the question on trial here is, whether the acts of seven individuals, beginning in 1870 and continued until 1906 do or do not constitute a conspiracy to restrict and monopolize trade in oil.

(2) In the period from 1870 to 1882, the property these seven accumulated was first held as partnership property, and then by Ohio Standard Oil Company and then in part by Vilas, Keith and Chester in 1879, and then in 1882 by the nine (9) trustees under that agreement. The acquisitions were all made prior to 1879, the court below finding:

> "It is true with negligible exceptions that the stockholders of the defendant corporations were the joint, equitable owners of them from 1879 or from their subsequent organizations respectively until July 1, 1899, but the great majority of these stockholders never held the legal title to their stock except during a few months between 1896 and 1900."
>
> (Opinion, Record A, p. 580).

(3) A portion of these properties so acquired had been purchased from others prior to 1882, and some of them supposedly had been engaged in competition with some of the properties the seven and their associates owned. But it is confidently asserted that the evidence is barren of proof to show that a single one of these properties so purchased was acquired by fraudulent, illegal or undue means. Of those who did sell to the seven and their associates, no one was called by the Government to so assert.

(4) The persons who in 1879 and 1882 owned these properties were the seven and their associates. They were then the undoubted, lawful equitable owners of them, but the legal title was held at different times in different ways. At one time by the partnership; at another time by the corporation, the Standard Oil Co. of Ohio; then by that company, and then by Vilas, Keith and Chester, trustees; and then by the nine trustees. The reasons why the changes were made were:

(a) The doubt as to the power of the Standard Oil Company of Ohio to hold properties outside of Ohio;

(b) The convenience, for purposes of management and control, of holding all the properties under one and the same title.

(5) The equitable owners who in 1882 conveyed to the nine trustees thereby acquired no other power or right than they had before the conveyance. They acquired no additional properties to those they already had, nor interest in other properties. They always of necessity had the legal title to their properties held by some one for them, and they always had to have agents and employes to attend to them; and the agreement of 1882 accomplished no other purpose, had no other purpose than to enable their owners the more conveniently to hold and manage their properties. The owners did not do this to smother competition or gain a monopoly. They had before they conveyed all they had after they conveyed—the same power,—the same properties.

(6) The method of holding properties is one largely acquired under the common law and from England. Under the law, tenancy in common—joint tenacy—co-partners—titles by fee simple—or a base or limited fee; for life or for years. All kinds of limitations as vested and contingent remainders—executory devices.

In equity,—equitable titles—where one held the legal title for the use of another. There are similar estates and other estates, such as springing and shifting uses.

The lawfulness of so holding properties is unquestionable. Before the trust becomes illegal, it must be shown it was made for the purpose of smothering competition, and forming by illegal means a monopoly.

(7) There is nothing on the face of the trust of 1882 which condemns it: nothing to show it was intended to or did

smother competiiton; nothing tending to show a purpose of gaining a monopoly. The properties conveyed to it were, when conveyed, non-competitive. They were owned by the same people as private traders and used in such trade, and they were not by law compelled to compete with each other. They were held and used after the trust just as before. They were so owned by the same persons in the same proportions. The trustees gained no power which the joint owners did not before have. Before the conveyance all the properties were used as one joint property in trade; after, just the same.

THE RIGHT OF INDIVIDUALS TO UNITE AND HOLD WHAT THE COURT BELOW CALLS POTENTIALLY COMPETING PROPERTIES OR BUSINESS WAS UNQUESTIONED AT COMMON LAW.

In *Mogul Steamship Company vs. McGregor,* 23 Q. B., 598, 618, Lord Justice Bowen said that:

> "It is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides."

Ontario Salt Co. vs. Merchants' Salt Co., 18 Grant's Chan., 540 (Ontario, 1871.):

A number of individuals and corporations, engaged in the manufacture and sale of salt, entered into an agreement to "combine, amalgamate and unite under the Canadian Salt

Association," and to sell all salt produced by them, through trustees.

The Court of Chancery held the agreement lawful, and enjoined a member from violating it.

Vice-Chancellor Strong said:

"Then there is no restriction on the sale of the salt, but it is all to be placed in the hands of the trustees, whose duty it is to sell to the best advantage, the interest of all being alike. What is this more than two persons carrying on the same trade binding themselves not to undersell each other? And can it be said that such an agreement would be in restraint of trade? The only distinction between such a case and this is, that in the case put the parties would be subject to the inconvenience of having constantly to adjust the prices with the risk of frequent disagreements, whilst in the present case that is obviated by leaving it to the judgment of a common agent. Suppose two producers of any article agree to consign all their produce to the same agent and to leave that agent to sell for same price. How would public policy be infringed by such an arrangement? The argument on the part of the defendants might be pushed so far as to make a partnership between two persons carrying on the same trade illegal as tending to lessen competition. * * * I do not follow Mr. Crooks in his argument that the number of persons associated in this arrangement made a difference. It appears on the face of the bill that they are not all the salt producers in the Province, and it also appears that salt, other than the produce of the wells of the plaintiffs and defendants, can be, and is supplied to the public. This being so, I think it makes no difference that this agreement was entered into by twenty persons engaged in the trade instead of only two."

Collins vs. Locke, L. R., 4 App. Cas. 674, 685. (1879.):

The House of Lords held valid, an agreement among four individuals and firms to divide the business of stevedores in the Port Melbourne.

The court said:

"The objects which this agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also it may be, to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by *proper means,* that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trades."

Wickens vs. Evans 3 Younge & Jervis, 318. (1829):

Three individuals engaged in manufacturing and selling trunks in different parts of England, agreed to divide the territory, and that each should have the exclusive right to sell in the district allotted to him. The purpose of the agreement was to prevent the inconvenience and loss resulting from competition.

Held, that the agreement was not illegal as in restraint of trade.

The court here suggested as the test of illegality, whether illegal means were used to exclude competitors.

"An objection is then made to that part of the agreement, by which it is stipulated, that, in case other

persons shall begin to trade as box-makers in any of the districts, the parties shall meet to devise *means* to promote their own views. What those means may be, it is unnecessary to surmise; but *we cannot presume that they will be illegal*; and, therefore, this stipulation does not affect the validity of the agreement."

THE JOINT OWNERS OF SEVERAL PARCELS OF PROPERTY NOT BOUND TO COMPETE.

National Cotton Oil Company vs. Texas, 197 U. S., 115, 128, McKenna, J.:

"There are some things which counsel easily demonstrate. They easily demonstrate that *some combination of capital is necessary to any business development,* and that the result must inevitably be a cessation of competition."

Atcheson vs. Mallon, 43 N. Y., 147, 151:

"Joint adventures are allowed. They are public and avowed and not secret. The risk as well as the profit, is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility and of the joint ability to do the service."

Cooke on Combinations (2nd Ed. of 1909); Sec. 129:

"It scarcely needs pointing out that the existence of the element of combination in no way necessarily involves the existence of an illegal restriction upon competition. Otherwise every partnership, indeed, cooperation under any form, would be illegal."

Fairbank vs. Leary, 40 Wis., 637, 642-643:

"The clause in the co-partnership agreement wherein each partner agreed not to transact on his individual account, within twenty miles of Waupun, the kind of business for the transaction of which the co-partnership was created, is unobjectionable."

"* * * *The law does not and did not require that these parties should compete in the purchase of produce.* Individually each had an undoubted right to bid therefor as low as he pleased. Collectively, they had the same right, unless deception was practiced on the public."

Marsh vs. Russell, 66 N. Y., 288, 292:

In holding valid a partnership agreement between certain persons who had previously been competitors, the Court of Appeals, by Earl, J., said:

"The business of furnishing recruits was a lawful one, and could be carried on by individuals or firms; when carried on by a firm its members could regulate the price at which they would buy and sell, as they could if they had been dealers in other articles having a price. *Suppose they had formed a partnership to buy and sell wheat, how can it be doubted that they could lawfully agree in their articles of co-partnership that neither member of the firm should come in competition with the firm, and that wheat should not be purchased for more than a certain price nor sold for less than a certain other price? Such an agreement would, certainly, not upon its face be unlawful, and could only be condemned by proof that it was part of a conspiracy to control prices or create a monopoly, or that it was made for some other unlawful purpose."*

In *Dolph vs. Troy Laundry Machinery Co.*, 28 Fed., 553, 555, Judge Wallace said:

> "It is not obnoxious to good morals, or to the rights of the public, that two rival traders agree to consolidate their concerns, and that one shall discontinue business, and become a partner with the other, for a specified term. It may happen, as the result of such an arrangement, that the public have to pay more for the commodities in which the parties deal; but the public are not obliged to buy of them. Certainly, the public have no right to complain, so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly."

Union Pacific Coal Company vs. United States, 173 Fed., 737 (C. C. A. 8th Cir., Nov. 19, 1909). Judge Sanborn:

> "There are lawful and unlawful combinations of persons conducting interstate and international commerce, and undoubtedly the former vastly outnumber the latter. There is no presumption that two or more persons who have combined to conduct interstate or international commerce, are guilty of a combination in restraint of that commerce."

Fechteler vs. Palm Bros. & Co., 133 Fed., 462, 471:

A corporation and a partnership engaged in the manufacture and sale of silk goods of a special character, formed an agreement by which each was to sell the other, goods at cost price, and to pay the other a percentage of its gross profits. In the opinion of the Circuit Court of Appeals, holding the agreement legal, Judge *Lurton* said:

> "Another ground of demurrer is that the contract in restraint of trade and void as against public policy.

It is difficult to see upon the face of the contract in suit any purpose to illegally restraint trade or commerce, bring about a monopoly, or enhance prices illegally, either under the Ohio statute (93 Ohio Laws, 143) or at common law. *It has never yet been supposed that, if one mercantile house or manufacturing concern obtained an interest in the other, such a contract, irrespective of all actual or probable effect upon the public, would be a contract void as tending to monopoly.* It may be that these two establishments were the sole makers or dealers in the goods they dealt in, and that an enhancement of prices would therefore follow, to the public detriment. But we can know nothing about the importance of the dealing between these concerns, except that which appears upon the face of the bill and its exhibit—the contract sued upon."

Wheeler-Stenzel Company vs. American Window Glass Co., Mass., 89 N. E., 28 (June 22, 1909):

The plaintiff and many other jobbers in window glass were stockholders in the National Window Glass Jobbers' Association, and had contracts with this association by which it agreed to purchase window glass in large quantities, and distribute it among the plaintiff and its other members.

In holding that these contracts were legal, the Supreme Judicial Court said:

"* * * it does not appear, if material, what proportion of the window glass jobbers in the United States is included in the association. It may be a small proportion. But whether large or small there can be

no doubt, we think, that *those included in the association had a right to combine* and appoint a common agent, which, according to the allegations of the declaration, was in effect what was done, to make purchases of window glass for them, and to distribute the window glass so purchased amongst them according to contracts severally entered into by them with such agent. They had the right to enter into such an arrangement even *though one of the objects of it was to avoid competing with each other in the market for window glass.*"

THE PRESENT CASE IS UNIQUE AND DIFFERENT FROM EVERY OTHER CASE DECIDED UNDER THE SHERMAN ACT, AND IT IS NOT OBNOXIOUS TO NOR RULED BY ANY OF THE DECIDED CASES.

The cases decided by the Supreme Court of the United States may be put into groups:

1. Cases where the different railroad companies charged with the duty of carrying interstate traffic for all alike, and competing for that traffic, by formal contracts agreed not to compete, not to fix competitive rates, but to appoint a committee or some agent to settle a common price for all. This was held to be a violation of the Sherman Act, because it restricted or stifled competition.

Such cases are the *Trans-Missouri case*, 166 U. S., 290, and the *Joint Traffic Association case*, 171 U. S., 505.

Really the *Northern Securities Case*, 193 U. S., 197, falls under this class, for, as the Supreme Court of the United States decided, it was held to be an agreement between the stockholders of two competitive railroads to suppress competition between them by practically consolidating the two railroads, and hence was void under the Sherman Act because it stifled competition.

2. Cases where different individuals and corporations engaged in interstate commerce, and competing theretofore entered into a combination whereby they agreed that they would not compete with each other; that they would not fix competitive prices, but, by various devices differing somewhat in the different cases, a uniform price was to be established which would govern all the members of the combinations. But in each case the marked features were:

(a) The competing traders agreed by formal contract to no longer compete:

(b) They agreed that the prices for all the competitors should thereafter be fixed without competition and by a selected body:

(c) They provided divers means by which others were prevented from competing for the trade; but chiefly they were fixing prices and controlling production:

(d) Devious and, in most cases, unlawful devices were used and approved by the combination:

(e) In each case the agreement was made or actively continued after the Sherman Act was passed:

(f) In no one of the cases did independent competitors merge into a partnership or corporation.

Such cases are:

The Addyston Pipe Case, 175 U. S., 211 (Pipe);
Swift & Company vs. U. S., 196 U. S., 376 (Beef);
The Cincinnati Co. vs Bay, 200 U. S., 179 (Packets);
The Chattanooga Foundry Co. vs. Atlanta, 203 U. S., 390 (Pipe); this case grew out of the Addyston Pipe case);
Montague vs. Lowry, 193 U. S., 38 (Tile).

All of these cases were held to be in restraint of competition, and therefore void under the Sherman Act.

3. *The Northern Securities Case*: We have at length (p. 31-47) considered this case and show the broad difference between it and the present case. Hence, we only briefly refer to it here: The method of the combination in this case was different, but in realty that constitutes the sole distinction between it and the Trans-Missouri and the JointTraffic Cases, for in the Northern Securities Case, as in the former, the owners of the Great Northern and the Northern Pacific railroads made a combination in restraint of interstate trade. Each of these railroads was a common carrier, bound to carry for all alike and at reasonable prices, and each was the competitor of the other for a large amount of the freight in the Northwestern portion of the country.

The Supreme Court in the Pearsall case had held that to combine the stock of the two competing railroads would be illegal.

The stockholders did attempt to do so through a New Jersey corporation and the Court held a New Jersey corporation could not authorize them to violate a federal law.

In our case we do not rely on the New Jersey corporation to give us rights we did not possess before or to authorize us to violate a federal law.

We use the New Jersey Standard Oil corporation merely as a convenient method of holding our property, not to gain a new power—not to smother competition.

Direct, Immediate, Substantial.

4. Only combinations which directly and immediately and necessarily and substantially restrain interstate trade or commerce are within the provisions of the Sherman Act. Even attempted state monopolies, as in the Sugar case, or combinations restricting the liberty of the individuals as to local state traffic, and which only indirectly affect interstate trade, are not within the act.

U. S. vs. Knight & Co., 156 U. S., 1;
Hopkins vs. U. S., 171 U. S., 579;
Anderson vs. U. S., 171 U. S., 604;
The Cincinnati Co. vs. Bay, 200 U. S., 179.

5. Another class of cases is where there was a direct combination to restrain by force persons engaged in interstate trade or commerce, and these were held to contravene the Sherman Act.

In *re Debs*, 158 U. S., 564. (Though this case was not by the Supreme Court of the United States decided strictly under the Sherman Act).

Loewe vs. Lawlor, 208 U. S., 274 (the Hatters' case).

6. Then comes a class of cases in reference to the enforcement by combinations of contract of sale, and here the distinction is that if the sale (as in the Connelly case) was only an incident of the combination, and the suit to maintain it did not require the proof of the combination, and the plaintiff's right to recover did not lay through the combination; that the combination might recover. But if, on the other hand (as in the paper case) the action involved the combination itself and it became part of the plaintiff's case and in order to recover the plaintiff had to prove the combination, then there could be no recovery.

Connelly vs. Union Sewer Pipe Company, 184 U. S., 540;

Continental Wall Paper Co. vs. Voight, 212 U. S., 227.

7. There are also cases where (as in the Harrow Case), the exclusive feature was granted by patents, and the contract was in pursuance of the exclusive right given by patents; also other cases in which it was held that a contract by which A sold to B a certain business, and covenanted not to engage in that business for a certain length of time, was good, though it was admitted that this covenant was in restraint of competition and thereby in restraint of trade, yet it was not in contravention of the Sherman Act.

Bement vs. National Harrow Co., 186 U. S., 70;

Field vs. Barber Asphalt Co., 194 U. S., 618;

Board of Trade vs. Christie Grain & Stock Co., 198 U. S., 236.

The case at bar is not included in or ruled by or like unto any one of the cases above cited.

The *Tobacco Case*, 164 Fed. Rep., 701:

As that case has been argued and is now before this Court, it would hardly be proper to discuss it. We but call attention to its marked and controlling characteristics as compared with those in this case.

CASE AT BAR.

In our case, is an orderly development and growth, beginning in 1862, of a hitherto practically unknown product —crude oil—everything about it was new—unknown and also weird. How it was produced, no one knew, indeed now knows. The rapidity of its production was and is unknown. The places where it will be produced—the quantities any territory or any well will produce were and still are mysterious. Production leaps from Pennsylvania to Ohio—to Kansas—to California—to Texas, and no one can foretell the place or quantity or quality of new production.

The uses to which the crude product could be put were unknown. By-products of the crude were at first thrown away as useless, but are now numerous and of great value. Methods of refining the oil, at first as crude as the product, were gradually improved, and thereby a larger quantity of better quality oil was produced.

The business required large capital to carry on successfully—to devise new methods of refining and of transporting and of storing the oil. The risk of the business was enormous

—uncertainty of production—of size of production—of quality of production, were all marked. Cessation of crude oil capable of refining meant the practical entire loss of investment. The chances of fire and of loss by evaporation etc., etc., added to the risk.

It was a business whose proper development required a large, well capitalized, efficient company, and only by such could it be properly handled.

It is undisputed that, starting in 1862 in a small way, with small capital, John D. Rockefeller, subsequently joined by others, by untiring energy, remarkable skill, abundant capital, necessary and continuous toil, began a business he and they nurtured and developed and grew to the size it is today. The law of competition governed the strife and gave the award.

MARKED DIFFERENCES BETWEEN THESE CITED CASES AND THE PRESENT CASE.

In the case at bar the joint ownership was formed *long prior* to the Sherman Act, and the properties were owned long prior to that date (with trivial exceptions noted). The combination was simply and only a joint ownership of property by a number of individuals. There was no covenant between them not to compete; there was no covenant by which a standard price could be fixed or production controlled; there was no covenant for division of territory; and no agreement to prevent others from joining in the trade; it was simply and only the joint ownership of different parcels of property used in the same business where the economic

laws governing such property, *and the use of the same* would, as a rule of trade, dictate to a large extent the modes of carrying on the business.

At the time that the Sherman Act was passed none of these properties were competitive. That they have not since become competitive we consider and prove elsewhere. Since the passage of the Sherman Act, the only properties purchased by these joint owners are given in the brief on facts.

The properties being jointly owned and in a common interest, were not required by any law to compete with each other any more than the members of a partnership could be required so to do.

> "The law does not and did not require that these parties should compete in the purchase of produce."

Fairbanks vs. Leary, 40 Wisconsin, 642, 643.

The Sherman Act did not compel such competition. Nothing is more common among joint traders than a covenant that each trader will give all his energies to the joint business. In partnerships such a covenant is most usual. The growth of the group of non-competing properties owned in 1890 has been the natural, healthy inevitable result of an unique business carried on with great skill and attention to details, where every economic rule was adopted and carried out which enabled the joint owners of the property to utilize the same not only to the great benefit of the public, but to the legitimate enrichment of themselves. The joint group did engage in a war of competition, but its warfare, and its means of warfare, and the weapons that it used, were not different from or other than those used by its adversaries when opportunity offered.

Prices were, from time to time cut, but generally to meet the tactics of the adversary. The group endeavored to thoroughly understand the oil business in all its branches, including the customers and tradesmen of its adversaries, as do all business men in different lines of business in which each is engaged. The group did endeavor to attract to it customers of the adversaries, as did the adversaries that of the group.

These defendants were not *quasi* public corporations like railroads owing peculiar duties to the public but private traders.

And we especially refer to the Brief on Facts as elaborating and proving our developments.

Gathering up.

Look at the things we have proven.

The case comes into this Court absolutely relieved of all the charges of fraud and illegal conduct on the part of the appellants. The Government cannot point to a single finding of the Court below of improper or illegal conduct on the part of appellants. Such charges in the Bill are not sustained by the court below, and the decree of the court below is not founded on any of them.

Our rights under the federal laws as to interstate and foreign trade in oil are, among others, these:

As citizens, we were entitled to enter into and take part in that trade, and this not as a statutory or a state favor, but because we were citizens of the United States.

We were entitled as of right to join with us in that trade other citizens, and with them form partnerships or corporations or trusts for the legitimate purpose of carrying on the trade.

The number of other citizens to be thus joined and when we would join them, was not controlled by any law, but was left to us to determine.

The mere size of our partnership—or our trust—as to numbers or capital was not controlled by any federal law—neither huge capital nor great numbers in a partnership, trust or corporation was or is *per se* unlawful.

It was not so at Common Law and certainly is not so under the Sherman Act.

The number of our refineries was left by the law for us to determine; it was just as lawful for us to build 100 refineries as one.

The ownership in connection with them and for joint use with them of pipe lines to carry the crude oil to them—of reservoirs to hold that oil—of tank cars and ships to carry the refined oil—of manufactories to make the by-products, and of marketing stations to sell the whole production, was not forbidden by any law.

The places where we would build and operate all these plants and their proximity to each other, were left to us. The mere fact that some of the units were built so as to be capable of competing with each other did not make it unlawful for us to so erect, and did not compel us to compete with any other unit.

Being joint owners of all the plants, we might operate them all as one whole, each part finding its appropriate work. No one of the units that made up the whole was bound to compete with any other unit.

We as of right might add to our plant as opportunity and our means allowed, and the extent of our acquisitions was not forbidden by any law, and especially not by any federal law.

We might make such acquisitions by such methods and for such considerations as were satisfactory to the seller. The law, and especially the federal law, did not limit us to any specific method of payment for such acquisitions.

The methods in which and by means of which we would hold our properties and manage our enterprises were left for us to select. So far as interstate or foreign trade was concerned, we might hold our properties and operate them as mere joint owners—or as a partnership—or as a corporation —or as a trust, and whichever form we used was to the Government indifferent. All alike were lawful.

Nor was the Government concerned as to how we held the title to our properties; the equitable title was just as lawful as the legal title, and if the equitable, then the legal title must be vested in a trustee, and this, too, was just as lawful. It was just as lawful to hold it through trust certificates or stock certificates and one is as lawful as the other —and the Sherman Act does not condemn either.

We were engaged in a private trading enterprise—we relied and had to rely on our own unaided energies and enterprise. The Government, neither federal nor state, gave us any aid such as grants of property or eminent domain or

like public rights, and we were therefore not within the class of railroad companies, gas companies, etc., etc., whose public privileges subjected them to public regulation and management, compelled them to compete, forbade competing companies to unite.

The corporate organizations of pipe line companies in some of the states did have the right of eminent domain, but this is but a comparatively small part of the united plant, and this right does not enter into or form part of the real, substantial business of refining and selling oil, nor qualify our rights as private traders therein.

As such private traders, we could sell to whom we chose, and refuse to sell to others; could sell to one man at one price, to another at a greater or less price; we could unite what businesses we chose; could refuse to sell to any one; could buy our crude product from whom we chose and for what price we chose, more or less than the market price.

The federal Government only has jurisdiction over interstate and foreign commerce. It does not have power over the thing which enters into such commerce until it does so enter. Before it enters it is not subject to or controlled or governed by federal laws. How the trader acquires the possession of such object does not concern the Government, and certainly not under the Sherman Act. The Sherman Act forbids the restraint of or the monopoly of interstate trade by unlawful means of exclusion of other traders, but it does not concern itself with how the trader acquires a title to the thing he brings into interstate trade. To prove that A and B unlawfully gained D's property, which they now put into interstate trade does not even tend to, much less, prove a restraint of interstate trade or an attempt by unlawful means to monopolize it.

The refineries and the trading stations are not articles of commerce. They do not enter into interstate commerce. The titles by which they are held or how they were gained are not within the federal jurisdiction—certainly not within the Sherman Act.

Even if it could be demonstrated (which it cannot) that the appellants procured by improper means some of the refineries they now use, and the product of which they put into interstate trade, this would not prove or tend to prove a violation of the Sherman Act. That a man unlawfully acquires a refinery does *not prove* that the product he produces is unlawful. Especially it does not even remotely tend to prove that when he puts that product into interstate trade, he thereby, and because he unlawfully acquired the refinery, restricts such trade or seeks to monopolize the same.

We could lawfully compete for and seek to monopolize all or any part of the interstate or international trade in oil. We could make that competition fierce, aggressive and unrelenting. Could depress prices to drive out competitors and raise them afterwards. Could give away oil to drive out a competitor. We could buy out a competitor to get rid of him. We could join the competitor with us in our business. We could use all the shifts and devices of traders to succeed, except that we could not, by unlawful, fraudulent means, deprive any competitor of his equal, lawful right to fight for the trade. We could not, by unlawful, fraudulent means, exclude him from the trade.

But all lawful means we could use—our capital, our products, the size of each, the entire wealth we had or could borrow and all our skill, energy, enterprise and foresight—we could freely use in the strife against a competitor as the competitor could also lawfully use the same against us.

The law encourages and rewards the successful competitor, and as a reward gives to him the power he has captured, i. e., to fix prices, exclude by lawful means others from the trade. But as the trade is never the same, but always new, as spring or summer or fall trade, the future trade must be left open to just such competition as was the captured trade, and the same combinations, the same trust corporations and combines and individuals may compete for it as before.

The trust agreement of 1882 is not *of itself* and *per se* illegal, even under any state law. If formed for a *legal purpose* of holding the property lawfully owned of a group of persons, it is valid not void—at common law. It is legal to form such a trust as a method or medium by which a number of citizens will engage in trade both state and interstate. If the trust when formed *lawfully* carries on such business and enterprise, it is not forbidden by the Sherman Act. If it does so *unlawfully* and thereby restricts interstate trade, or attempt by lawful means to exclude other traders from it, it is obnoxious to the Sherman Act. Each one of the state cases really went off on the proposition that the trust method of managing the state corporation was forbidden by state laws.

All the state cases cited added to the mere formation of the trust that it was done for an illegal purpose, i. e., to restrict commerce and monopolize trade.

This distinction is relied on in the Calumet-Hecla cases cited at length (*Ante,* pp. 109-110).

See opinions of Judges Lurton and Shippen.

The Sherman Act does not forbid any kind of an organization to engage in interstate trade,—neither partnerships nor corporations—combinations or trusts. Each and

all may freely so engage, but in so engaging each is bound by the law common to all which is:

> "You may each compete for the interstate trade, but in so doing you can use only *lawful* means. If you use unlawful means—if you cheat and defraud or by force exclude other traders from continuing to compete, you violate the Sherman Act."

The Sherman Act does not, as a penalty for its violation, forbid the guilty one to further engage in interstate commerce. It does not inflict that penalty, and the federal courts cannot inflict it as was done in this case.

The Sherman Act does not seek to break up business or disintegrate business organizations or inflict in an equitable proceeding any punishment of that kind. If it had so designed, plain words would have been used giving such powers to the Court.

It merely seeks to enjoin—restrain—prevent *illegal* means being continued by which any organization seeks to restrict competition. When the illegal methods are abolished, competition becomes free, and all may lawfully, now using only lawful means, enter the list.

The Court below has not found in favor of the Government on any of the charges in the Petition as to fraud, deceit or unlawful conduct of any kind on part of appellants. All these were alleged in the Petition—denied in the Answer. The Court eliminates them from consideration. The Government does not except to this method of treatment nor appeal from it, but stands in this Court on the opinion and decree of the Court below.

The Court below on the issues of fact as to whether there was a conspiracy, found there was one, but it did not begin until after 1890. Therefore, there could not have been acts of the conspiracy done prior to its formation. Therefore, all the acts prior to 1890 are immaterial.

Re-statement of most material points.

From all these things, we gather the following as important in directing our examination of the facts:

First. To prove as against private traders a restraint of trade under Section One of the Sherman Act, you must prove an actual restraint, not a mere attempt to restrain. (*The rule is probably different as to quasi public corporations such as railroads.*) That restraint must be by contract or combination or conspiracy. It must be of interstate trade and must be direct, immediate and substantial. The mere restraint which necessarily follows from the lawful gains of competition in not a violation of the Sherman Act, for if so, competition would be killed and the purpose of the Sherman Act defeated.

Second. To prove a monopoly under Section II, you must prove that the individual or combination gained the control of interstate trade in oil, or attempted to gain the same by unlawful means. If such gain was made or attempted to be made by lawful means, the law allows it and the very purpose of the Sherman Act was to protect it and further it, for it made competition free. As bearing on the question of the lawfulness of the means employed in gaining control of the oil trade, one has to take into view the economic situation, and here it will be seen that the evolution of such

a combination as the Standard Oil Company was a necessary and inevitable consequence of the laws of trade as applied to such a unique and unparalleled industry as the production and refining and sale of crude oil and its products.

See brief on facts.

THIRD. Any competitor in trade may buy the business of another or others or as many as he can, and for the express purpose of getting rid of their competition. If by the lawful means of competition he compels them to sell to him, it is legitimate gain.

Competition knows no restriction except that the means used shall be lawful. The question of whether it is fair or unfair, or due or undue, or reasonable or unreasonable has nothing whatever to do with it. The sole test is: Were the means used in competition lawful.

FOURTH. And the test of lawfulness in the interstate trade is not the State law, statutory or common, but it is the Federal law, and it is the Federal law within the commerce clause of the Constitution. To point out that any given thing done by the defendants in the gaining of the so-called monopoly was unlawful and criminal, the Government must show some Federal law which made it so. The thing charged in this petition is a crime. There are no crimes under the Federal law except that which Congress declares, and therefore only Congressional Federal legislation can be relied upon by the Government in proof that the defendants had committed a crime in attempting a monopoly prior to the Sherman Act of 1890.

The individual defendants are not only citizens of the United States, but they are citizens of the State in which

they reside. Each sovereign has a distinct and independent jurisdiction, and neither relies upon nor carries out the laws of the other. The action of these citizens of the United States in interstate trade prior to 1890 and subsequently must be tested by Federal laws; and it is wholly indifferent that their actions might have been in conflict with any of the laws of any of the States.

The right of the individual as a citizen of the United States to fully engage in the interstate trade antedates the constitution.

In *Gibbons vs. Ogden,* 9 Wheaton 211, Marshall, C. J., said:

> "Pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized men throughout the world. This is true. The constitution found it an existing right and gave to Congress the power to regulate it."

In *Gilman vs. Philadelphia,* 3 Wall. 713, 737, Mr. Justice Clifford said that the

> "right of intercourse between State and State was a common law privilege, and as such was fully recognized and respected before the Constitution was formed. Those who framed the instrument found it an existing right."

It has no constitutional limitation: it can be restrained only by Congressional action; and there was no such Congressional action prior to 1890 when the Sherman Act was passed. The federal courts cannot of themselves restrict that liberty except as the result of Congressional action.

FIFTH. The trust agreement of 1882 when it was made was not of itself and *per se* illegal under the common law, either state or federal. It was made for the more economic and convenient management of the joint properties used by the Standard group in the oil business; it was lawful. It has not been shown it was made for any other purpose. The mere method in which joint traders will hold their joint properties is not prescribed by the Sherman Act. All methods are, under it, lawful, but none of them may be used to violate the act by restraining trade or unlawfully forming a monopoly.

SIXTH. The Agreement of 1882 was not a violation of the Sherman Act unless it was used to restrain trade or monopolize by unlawful means a portion of it. The change from the method of holding under the Trust Agreement to that of a corporate holding is not unlawful under the Sherman Act, unless such method is used for the unlawful purpose of violating the Sherman Act.

SEVENTH. Joint owners of properties used in private trade are not bound to compete with each other, and the mere fact that if separately owned they might so compete, is not a violation of the Sherman Act.

EIGHTH. Certain important things should not be overlooked:

(a) That the point of time we are inquiring about is November 15th, 1906, when the Petition was filed:

(b) That in this mode of proceeding in equity the sole question is, Were the defendants violating the Sherman Act on November 15th, 1906?

(c) Prior violations, if any, are immaterial; alleged improper acquisitions of refineries are not in-

volved here: alleged prior acceptances of rebates are not involved here:

(d) The defendants are private citizens engaged in a private enterprise where their rights and privileges are to some extent different and otherwise from that of railroad corporations:

(e) The defendants deal solely in crude petroleum and its products. . This case does not involve any question as to the acquisition or the use of properties located in any of the states:

The only question here is as to the interstate trade in oil and its products. The intrastate trade, however acquired and however carried on, is immaterial.

(f) Alleged examples of unreasonable or even illegal means used in competition prior to November 15th, 1906, or of the acceptance of rebates prior to November, 1906, are irrelevant, unless the unlawful things be shown to have actively continued when the petition in this case was filed.

It was perfectly lawful, indeed praiseworthy, in 1862, for John D. Rockefeller and each one of his six associates who subsequently joined him, to do separately and jointly the following things:

(a) Each to enter into and engage in interstate and foreign trade in oil and its products:

(b) Each to combine with one or more of the others and with corporations to enter into and engage in such trade:

(c) Each to seek to gain for himself and all for themselves in the legitimate and lawful extension of

their business so much of the trade as they could. No law, either State or Federal, restricted the extent or percentage of their gains of this interstate business:

(d) Each and all might avail himself and themselves of all the methods which the law authorizes, in part creates by statutes, to further this quest for interstate trade; they might form partnerships; they might form trusts; they might form corporations, and use each or all of them in the furtherance of their effort to gain interstate trade.

Assume, (*arguendo*) that Congress might prohibit corporations or trusts or combines from engaging in interstate trade: it is quite certain that Congress never has done so, and that, as we have seen in the Sherman Act, Congress has, on the contrary, recognized the propriety of combines and corporations and trusts engaging in interstate trade. No one of the seven individual defendants was forbidden by any Federal law to join or create a combination or a corporation or a trust for the purpose of engaging in interstate trade.

Assume (*arguendo*) that Congress might limit the extent to which corporations or trusts or combines or individuals might carry on interstate trade: it is positively certain that Congress never has passed such a law.

(e) Assume (*arguendo*) that some year prior to 1906 the Standard Oil Company after the passage of the Sherman Act attempted to prevent completion of the United States Pipe Line, or received preferential rates from some railroads, etc.; yet as none of these things were being done when the Petition was filed, they do not justify the Petition which can and does only ask for the restraint of what was going on when it was filed in November, 1906.

(f) Prior to 1890 the combining to restrain interstate trade was not prohibited by Congress—was not by

any federal law made a crime. The citizen of the United States as such was not by any law forbidden to so combine. There was no law giving the Federal courts power over such contracts, even in restraint of interstate trade. Until 1887, when the interstate commerce act was passed there was no Federal law forbidding the taking by the citizen of rebates or drawbacks on even interstate shipments, and any citizen of the United States, so far as the Federal laws were concerned, might take all the rebates he could get.

This does not conflict with the *Western Union Telegraph Case,* 181 U. S, 92, which involved only the duty of a public servant.

(g) A combination prior to 1890 to restrain or monopolize *interstate* trade was not only not a thing forbidden by any act of Congress, but it was not of itself a regulation of commerce, nor did it directly, immediately or substantially affect interstate trade as did the acts done in the Debs Case, (158 U. S.), or the Hatters Case, (208 U. S.)

Facts.

The facts are exhaustively considered in other briefs, of the appellants, but a very slight sketch of them in the light of the foregoing will help, I think, to a clearer insight of the great injustice the Court below unwittingly did us by its decree.

The Sherman Act protects honest traders, however wealthy—however powerful. It denounces only those traders who use unlawful means.

The intent of the Sherman Act was not and is not to cripple trade or to restrain it or lessen it, but on the contrary to free it and enlarge it.

That Act is not concerned with and did not and does not seek to determine the method by which property will be held, but left that to the states in which the different properties were located.

The Act, being a criminal one, deals with malodorous conduct, such as one usually attributes to conspirators who seek to violate the law, whose conduct is wrongful and criminal, immoral and unlawful.

It is that class of men the Act condemns.

It is not the class of men who produce and construct and build up and make successful the large business enterprises of the day that the Act condemns.

It is not the honest, industrious men who studied, worked with, conserved, improved, refined and introduced and sold to the world the extraordinary natural product which, in its crude state of little value, became through their work the cheapest illuminant of the world and a blessing to mankind.

These men who have built up and created the combination or the group of properties known as the "Standard Oil Properties" began their work in the earliest period of production, 1862 to 1880, when crude oil towns rose and fell as mining towns of the gold and silver regions do: when the excitement of sudden wealth by unexpected developments of crude oil drew thousands of men to whom, in that early period, the strict rules of law were but little known, and were as often disregarded by all as they were observed.

That was a period where each refiner or shipper of oil on the railroads made the best terms he could for the transportation of his oil, and no one of them then imagined that there was any other feasible way to transact such business. Like the transportation in barges down the Allegheny River —each barge owner got the highest price he could, and each shipper of oil the lowest price. It was a period when the excitement of the new discoveries of oil and the highly speculative period succeeding 1865 encouraged the building by many of new and inefficient and poorly built refineries, until the capacity of such refineries far outran the oil production, and the failure of many of them was inevitable.

When new and enlarged and more expensive refineries were imperatively demanded by the increasing trade and but

few men were able to provide the funds adequate for such purpose, and still fewer of them were willing to embark in so hazardous an enterprise: when the place or places of production of crude oil were utterly unknown: when the continuity of the production of any known well, or indeed of any well at all, was wholly uncertain—men gambled in such a business, took risks, made sudden fortunes and lost them as suddenly. Many incapable men entered into this business, and the law of evolution worked in it, and only the few and the fit survived. It was only the few sober, industrious, eager, long-sighted and long-headed men, with their eyes to the future and the great possibilities of that future, who survived; men who were willing to forego the comparatively small profits of the present for the possible enormous profits of the future. These men risked their fortunes in and devoted their lives to this enterprise. They took all the elements of risk: they were entitled to a very large element of gain.

PRODUCTION OF CRUDE OIL IN THE UNITED STATES.

Year.	Barrels 42 Gallons.
1859	2,000
1860	500,000
1861	2,113,609
1862	3,056,690
1863	2,611,309
1864	2,116,109
1865	2,497,700
1866	3,597,700
1867	3,347,300
1868	3,646,117

1869	4,215,000
1870	5,260,745
1871	5,205,234
1872	6,293,194
1873	9,893,786
1874	10,926,945
1875	8,787,514
1876	9,132,669
1877	13,350,363
1878	15,396,868
1879	19,914,146
1880	26,286,123

From 1859 to 1876, the production of crude oil was confined to the states of Pennsylvania and New York. In the latter year the development shifted to the state of Ohio, which began with 31,763 barrels, and West Virginia, which produced 120,000 barrels. California also produced 12,000 barrels in that year.

In 1883, Kentucky and Tennessee first produced 4,755 barrels; in 1887 Colorado began with 76,295 barrels; in 1889 Indiana first produced 33,375, Illinois 1,460, Kansas 500 barrels. In 1896, Texas produced 1,450 barrels and the next year 65,975; and in 1902 Louisiana began with 548,617 barrels.

The price of crude oil prior to 1865 varied from ten cents a barrel to sixteen dollars a barrel—from 1865 to 1870 from $1.90 per barrel to $7.25 per barrel.

Barrels then cost from $1.60 to $2.10.

Transportation at first cost from $1.50 to $4.00 per barrel.

When over-production, feverish times, panicky times of 1873, 1880, and the inevitable consequences of high speculation became due, dozens of refineries were of necessity cast upon the market, and were practically sold for what they would scrap.

There were few men who would buy such refineries and still fewer who would buy any number of them, but these appellants, still looking to a large ultimate success, again took the risks: they purchased many of them: reconstructed and rebuilt some, and added the good suitable material of the old to the enlarged new plant. Many of them were incapable of use in the refining of oil.

After 1882 they very largely constructed, built, improved and enlarged their own properties.

The value of all their refineries in 1882 was $17,000,000.00. Between 1882 and 1906 they spent in improving and enlarging these over $40,000,000.00.

Between 1882 and 1900, the appellants purchased but four refineries of any importance: the two Globe Refineries, the Atlas Refinery and Borne, Scrymser & Co. In 1900 they also purchased a small refinery in California as part of the Pacific Coast Oil Company. From 1882 to 1906 these were the only refineries of any importance they purchased, but in that period they very largely improved and enlarged the other refineries they owned, and also greatly improved and enlarged the refineries they had purchased between 1882 and 1906.

In 1906, the total output of refined oil of the Standard Refineries was 24,188,826 barrels of fifty gallons each.

In 1906 the Standard Oil Company had the following refineries in actual operation, the inventory value being set opposite each separate refinery. (See Defendant's Exhibit 269, Vol. 19, p. 627).

Company.	Capacity bbls. 42 g. crude yearly.	Cost.	
		Real Estate.	Improvements.
Atlantic Refining Co., Eclipse Works, Franklin, Pa	3,285,000	23,776.00	1,984,718.69
Pittsburg Refinery	461,725	179,174.70	203,507.17
Atlantic Philad. & Marcus Hook Refineries	11,915.425	975 981.43	9,468,108.91
Solar Refining Co	1,861,500	78,572.75	1,943,879.28
Standard Oil Co. (Cal.)	6,807,980	580,429.42	3,387,272.32
Standard Oil Co. (Ind.) Whiting, Ind.	8,192,790	259,378.98	7,828,708.39
Sugar Creek, Mo	3,011,980	30,175.00	1,142,705.48
Standard Oil Co. (Kas.)	1,645,500	12,525.50	477,933.77
Standard Oil Co. (N. J.) Bayonne Ref.	13,840,435	1,988,076.96	10,061,238.84
Baltimore Div.	2,206,790	186,013.44	1,076,568.08
Camden Works, Parkersburg	534,360	44,722.56	767,035.19
Eagle Works	3,273,320	296,685.16	2,306,515.97
Standard Oil Company of N. Y. Atlas Works, Buffalo	982,215	87,348.51	1,378,712.12
Long Island Refy	1,950,195	669,498.85	1,182,646.47
Pratt Works, Brooklyn	1,578,990	586,729.05	1,093,533.08
Pratt Works, L. I. City, tar	530,710	161,773.99	1,824,310.25
Sone & Fleming Works	1,689,950	517,489.66	1,509,992.41
Standard Oil Co. (Ohio)	2,122,840	501,600.54	1,439,006.80
Vacuum Oil Co., Rochester, N. Y.		31,725.00	514,912.40
Olean, N. Y	2,578,725	28,885.76	857,691.22
Total	68,470,430	$7,240,563.26	$50,448,996.84
			$57,680,560.10

The refineries owned in 1882 consumed 16,500,000 barrels of crude oil annually; the present refineries in 1906 had a capacity of 68,462,420 barrels annually (Defendant's Exhibit 269), and in that year actually consumed 64,958,301 barrels (Defendant's Exhibit 269). This consumption was increased to about 72,000,000 barrels in 1907 (Archbold, Vol. 17, p. 3252), and the capacity of the refineries has of course been necessarily increased to take care of this.

We are not able to exactly gather from the evidence the money the Standard expended from 1882 to 1906 in building and improving its properties but we believe that approximately the following are fairly accurate—

Refinery Construction:		
1882 to 1899,	about	$30,000,000
1900 to 1906,	"	20,000,000
Pipe Lines:		
1882 to 1899,	"	28,000,000
1900 to 1906,	"	70,000,000
Tank cars:		
1882 to 1899,	"	3,000,000
1900 to 1906,	"	5,000,000
Marketing Stations:		
1882 to 1899,	"	10,000,000
1900 to 1906,	"	7,000,000
Ships:		
1882 to 1899,	"	11,000,000
1900 to 1906,	"	10,000,000

We arrive at these figures in this manner:

In 1882 the Standard Oil assets—refineries—were $17,000,000.00. Vol. 17, page 3253.

In 1906 the refineries were $57,680,560.10—of which $50,448,996.84 was for improvements. Defendants' Exhibit 269, Vol. 19, page 627.

In 1883 the assets were $72,869,596.46. Petitioner's Exhibit 941.

In 1906 the assets were $359,400,193.31. Petitioner's Exhibit 10.

In 1882 mileage of pipe lines was 3,531 miles. Defendants' Exhibit 261.

In 1906 mileage of pipe lines was 54,616 miles. Defendants' Exhibit 261.

In 1882 the marketing stations were 130. Vol. 17, page 3242.

In 1906 the marketing stations were 3,573. Defendants' Exhibit 264.

These figures accurately show $50,000,000.00 spent in improvements of refineries, and $40,000,000.00 of that spent between 1882 to 1906.

The total net assets between 1883 were $72,869,596.46, and in 1906, $359,400,193.31.

This gave an increase of about $280,000,000.00.

We estimate from increase in pipe lines, marketing stations, etc., the expenditures in constructing them.

As the early oil business grew, pipe lines called "gathering lines" to take the oil from the well and deliver it to the refinery became necessary, and these men acquired part, but in large manner actually built many of these lines. They also laid out and built pipe lines connecting the West with the Atlantic Ocean in the East.

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alleged in the petition. It is especially noticeable that the Court did not find that in the acquisition of our properties we used any illegal means—either fraud or deceit or intimidation. The Court did not find that the purpose of making the trust agreement of 1882 was to smother competition or gain a monopoly; or that in the strife for interstate trade we used illegal means.

The facts upon which the Court ACTED eliminated all charges of unlawful competition or monopoly and assumed that appellants in 1899 owned a non-competitive group of properties operated as one whole.

On July 2, 1890, the nine trustees were the legal owners of all the properties of the Ohio Standard Oil Company and other corporations.

All this property was one entire whole and operated as such; as if it were all owned by one person.

The combined legal and equitable titles made an indefeasible ownership. All this property was managed and controlled by the seven individual defendants in this case, acting through the nine trustees.

There was *no competition* between or among any of the properties. It was expressly and strictly a *non-competitive* group; and if at any time any parcel of the group had been in any kind of competition, that ceased before 1879, and since then competition never has existed. Such parcels of the group as were purchased prior to 1879, had been so changed and enlarged that it had become, by 1890 (certainly by 1899), to all intents and purposes, a new property. What kind of competition, if any, had actually existed prior to 1879 between any one unit then purchased and the then group, whether

All charges of fraud and illegal means in competing are eliminated. The facts found in the decree are as follows:

"Section 1. That in and prior to the year 1899 there were twenty corporations organized respectively under the laws of various states engaged in commerce in petroleum and its products, either among the states, or in the territories, or with foreign nations, and these corporations held a majority of the stock and controlled the business and operations of many other corporations engaged in that commerce; that one of these corporations was the Standard Oil Company of New Jersey, hereafter called the Standard Company, which had a capital stock of $10,000,000.00; that since the year 1890, the defendants named in section two of this decree have entered into and are carrying out a combination or conspiracy in pursuance whereof about the year 1899 they caused the capital stock of the Standard Company to be increased to $100,000,000.00, caused a majority of the stock of the nineteen companies, and the power to control them, and to manage their trade, and the power to control the corporations which they controlled and to manage their trade, to be vested in and held by the Standard Company in exchange for its stock which was issued to the former holders of the stock of the nineteen companies, and caused the Standard Company ever since to control all these corporations, hereafter called the subsidiary corporations, and to manage their trade without competition among themselves as the trade and business of a single person; that this combination or conspiracy is a combination or conspiracy in restraint of trade and commerce in petroleum and its products among the several states, in the territories and with foreign nations, such as an act of Congress approved July 2, 1890, 26 Stat. 209, c. 647 (U. S. Comp. Stat. 1901, page 3200), entitled, 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies' declares to be illegal." (Rec. A-525)

reasonable or unreasonable, the Court does not find, regarding it as unimportant in the Court's view of the case. It did find that prior to 1879 we had acquired competing refineries, but how—of what importance—under what circumstances, it did not find. And it did not charge or find that our acquisition of any of those properties was by improper or unlawful methods or that it was illegal for us to acquire them.

The Vilas, Keith & Chester Trust of 1879 and the new trust of 1882 were not, the opinion assumed, legally objectionable, or at least dismissed as immaterial, the Court in its view of the case, treating them, at least for the purposes of the opinion, as methods of holding property, which were not objectionable under the Federal law prior to July 2, 1890, or indeed under the common law.

The increase after 1879 in the properties held in 1879, both in numbers and values, was largely by use of the earnings of those properties in improving those already held and purchasing like properties, and all this increase was by the persons who owned them in 1879. The Court said:

> "It is true with negligible exceptions that the stockholders of the defendant corporations were the joint equitable owners of them from 1879 or from their subsequent organizations respectively until July 1, 1899." (Rec. A, p. 580.)

The owners of these properties, acting through the trustees, used the earnings of their property to purchase other properties and enlarge and improve their own. (Rec. A, p. 574.)

And the Court recognized that it was dealing with the rights of the seven individual appellants; that they were the

ones charged with the conspiracy in the Bill. The corporations, including the Standard Oil Company of New Jersey, were merely the pawns in the game which the seven used. The question always was the rights of the seven and their associates, and not the power or rights of corporations. The separate rights of the corporations that the seven used in this case under these pleadings were negligible.

The Court started on July 2, 1890, with a prosperous enterprise which had begun in 1865 in a small way in a new and unique and unprecedented production, which, by the unceasing labor, skill and enterprise of seven extraordinary men, and the re-investment of its earnings and use of great capital, had, in the course of twenty-five years, developed into one of the great successes of modern times, and *lawfully so* developed.

What was it, then, the seven individual appellants and their associates *did* after July 2, 1890, which brought them under the condemnation of the Sherman Act?

Nothing but the conveyance of these properties in 1899 to the Standard Oil Company of New Jersey, and taking in lieu thereof stock in that New Jersey corporation.

It was the seven individuals, the Court found, who did that:

"* * * they caused the *stockholding* trust of 1899:"

"* * * they still hold the actual control and direction of the *Standard* Company:"

"* * * since 1899 they have been and still are engaged in carrying into effect and executing that trust."

It was the doing of that, *and that alone,* which brought upon the seven the condemnation of the Sherman Act.

See extracts from Opinion printed *ante*, pages 18 to 21.

Up to 1899 the properties under the trust of 1882 were handled and used by the seven through the nine trustees exactly as they were afterwards managed by the seven through the Standard Oil Company of New Jersey.

The properties were non-competitive before 1899 and under the trust, and they remained exactly as they were after 1899 under the Standard Oil Company of New Jersey .

If so, how did a change by the seven of the mere method of holding the properties, the management remaining as before, violate the Sherman Act?

The corporation, the Standard Oil Company of New Jersey, did not confer upon the seven individuals any new and greater powers in the management of the properties than they, the seven, had under the trust of 1882, as it was claimed in the Northern Securities case that the charter of the Northern Securities Company had conferred upon the prior owners of the stocks of the two competing railroads. The properties of the Standard Oil group after they were conveyed to the New Jersey corporation were equitably owned by exactly the same persons in the same proportions and held for the same uses and so used and with no added power, and were managed by the seven exactly the same as before.

Why, then, was this transfer a violation of the Sherman Act?

The Court below said (*ante*, pp. 18-21), because this Court, in the Northern Securities Case, 193 U. S., 197, 321, 322, had so held.

Did the Northern Securities Case so hold?

DIFFERENCE BETWEEN THE NORTHERN SECURITIES CASE AND THE CASE AT BAR.

Let us see:

(a) The Securities case involved two competitive railroad companies, each of which owed duties to the public to continue in operation and to carry for all alike.

The present case involves only the rights of seven American citizens and their associates, managing, through private trading corporations and associations, a private trading business in the production, refining, transportation and sale of oil. No one of these individuals or corporations owes any such duty to the public as the railroad company does. The traders may sell to one and refuse to sell to another—may sell at one price to one and to another at a less or greater price: may wholly cease to do business.

There is hardly a case in this court touching such questions where these differences are not recognized and relied upon.

(b) When the control of the two railroads was conveyed to the Northern Securities Company, the railroads

were then in *active, actual competition.* The conveyance of control of both to the Northern Securities Company gave that company the power to stifle the competition, and hence restrict interstate commerce. It was substantially the merger of the two railroads.

In the present case the properties of the seven individuals and their associates, the private trading corporations, were not, when conveyed in 1899 to the New Jersey corporation, in competition; and really as they existed in 1899, never had been. Nor were they in 1899 bound to compete with each other. If any of them ever did, to any extent, compete with each other, it was prior to 1879, at which time, and even now under Federal law, one trading competing corporation might, and may, lawfully buy another. None of these refineries *ever did* compete with each other. If any did compete before 1879 with the other refineries owned in 1879, such refineries were not in existence in 1899. The old fashioned, much-used and antiquated works prior to 1879 had given way to much larger, newer constructions long prior to 1899. They were not the same plants in 1899 that had existed in 1879. Those of 1899 were neither substantially nor legally the units that existed prior to

1879. Substantially the aggregation of 1899 was new construction, and largely new and novel improvements. The nature of the units that made up the group in 1899 of itself largely prevented competition. The pipe lines, trading stations, tank cars for refined oil, and reservoirs were not competitive and never had been.

(c) In the Securities Case the stocks in the two competing railroad companies were, prior to the assignment to the Securities Company, owned by distinct and independent bodies of men, which each acted independently of the other and had no interest in the other's property. These two groups never became one until their stocks were exchanged for stock of the Northern Securities Company, whereby they did become one group. (193 U. S., 202, 321-322, 364).

In the present case before the transfer of 1899, all the stocks and properties were owned in common by all the stockholders, each one of the stockholders having an interest in every single parcel of property. There was only one group. There never

had been but one since 1879. The transfer in 1899 did not change the group or the ownership. All remained as it was before the transfer.

(d) The thing the Government complained of in the Securities Case was that the power to control these two railroad companies was put by Morgan, Hill and others in the Securities Company, which Securities Company was organized by them under the laws of New Jersey, for the express and, indeed, sole purpose of holding such stocks. They claimed to be able through and by this corporation to lawfully acquire and lawfully own this control, which gave to the Securities Company the power to cripple interstate commerce, contrary to and in violation of the terms of the Sherman Act.

Messrs. Hill and Morgan and their associates knew they could not directly combine and themselves jointly hold the control of both railroads, each having a like interest in one. These two never did so jointly hold, and never conspired to so hold except through the Securities corporation. Their conspiracy was to put that control in the Securities Company, which they thought was a legal method of securing such control.

Thus Mr. Justice Harlan said, on page 321 of the Securities case (193 U. S.), that Hill and Morgan and others—

"* * * entered into a combination to form under the laws of New Jersey a holding corporation to be called

the Northern Securities Company, with a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof."

Thus the Securities Company gained a *new power* that Hill and Morgan did not pretend prior thereto they had acquired, i. e., to smother competition between the railroads. They, as individuals, did not dare to put into their hands by a joint ownership of the railroad stocks such power, because in *Pearsall's Case*, 161 U. S. 646, this Court had already said that such a combination giving such a power would be illegal. They sought a legal method of acquiring such power, and they thought the New Jersey corporation was the right way.

The New Jersey corporation was organized by them as an essential and indispensable part of their scheme.

In the Securities case the Hill group and the Morgan group sought, by their transfer to the Securities Company, to gain a new power—one they never had before—the power to lawfully hold the power to smother competition in two competing railroads.

See how this entirely distinguishes *that* case from *this*.

In our case the properties after the combination were held exactly as before—save that the legal

title before 1899 was held by the trustees and after 1899 by the corporation. No new group of owners or of properties was formed. No new or additional power was acquired by the transfer to the Standard Oil Company of New Jersey that did not exist before. Indeed the powers of the trustees prior to 1899 were greater over the properties and business than the power of the corporation after 1899.

The Standard Oil Company of New Jersey was organized in 1882—as a manufacturing corporation and not as a mere holding company. It acquired several refineries, and in 1899 was engaged in a large manufacturing industry, i. e., refined oil.

Its owners, also the owners of other properties, under the statutes of New Jersey so authorizing, enlarged its capital stock and conveyed to it their other properties as a convenient economic method of managing them.

(e) The suggestion of the Court below (Rec. A. p. 580), that *prior* to the conveyance to the Securities Company, Morgan and Hill had made a pool of the stocks in both railroads and thus jointly owned both, and each stockholder had an interest in the stock of the two railroads, and that the two bodies had become one and competition had then ceased, is in conflict with the evidence already cited, and

also with the following excerpts from the opinions of Justices Harlan, Brewer and White in the Securities case and extracts from the Petition filed by the Government in that case (193 U. S., 197).

Justice Harlan said (p. 320) that the Great Northern and the Northern Pacific Railroad companies owned and operated lines of railroads which ran across the continent, and that they—

"were and are parallel and competing lines;"

"and the two companies were engaged in active competition for freight and passenger traffic."

There was no completed union of the two bodies of stockholders until the conveyance to the Securities Company.

Justice Harlan (p. 322):

"Thus as stated in Article VI. of the bill, 'by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to-wit, the holding corporation with not only the power but the duty to pursue a policy which would promote the interest, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems *was to be* removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established.'"

(p. 324):

"In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies."

(p. 325):

The Securities Company was not organized in good faith, but as a mere method of perfecting the conspiracy.

By this scheme—

"the former stockholders of the Great Northern Railway Company have received or would receive and hold about fifty-five per cent. (of the Securities Company stock) the balance going to the former stockholders of the Northern Pacific Railway Company."

(p. 326):

Justice Harlan delineated the scheme—

"of organizing a corporation under the laws of New Jersey which should hold the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation."

(p. 335):

"What the Government particularly complains of, indeed all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the Act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them."

(pp. 333 to 347):

Justice Harlan combats the assertion that the Northern Securities Company, *as a state corporation*, might lawfully

acquire and hold the control of the two competing railroads, which was the chief defense offered.

All the stock the Securities Company acquired in the two railroad companies—

> "was acquired and held to be used in suppressing competition between those companies. It came into existence *only* for that purpose." (p. 354)

We respectfully insist that an examination of Justice Harlan's opinion will demonstrate that the Court below unintentionally, but most decidedly, fell into error in its assertion above quoted.

Justice Brewer said:

> "There was a combination by several individuals *separately* owning stock in two competing railroad companies to place the control of both in a single corporation. The *purpose to combine* and *by combination* destroy competition existed before the organization of the corporation, the Securities Company." (p. 362).

It was part of the purpose to organize the Securities Company, and competition itself was to be and was destroyed only by conveying to the Securities Company—and not by anything done prior thereto.

Mr. Justice White said:

"Mr. Morgan and Mr. Hill and a few persons immediately associated with them *separately* acquired and owned capital stock of the Northern Pacific Railway Company, aggregating a majority thereof. Mr. Hill and others associated with him owned in *the same manner,* about one-third of the capital stock of the Great Northern Railway Company. * * * (p. 365) Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads." (p. 364).

THE GOVERNMENT IN ITS PETITION IN THE NORTHERN SECURITIES CASE, (193 U. S. 197), AVERRED:

"The Northern Pacific Railway Company and the Great Northern Railway, *at* and prior to the doing of the acts hereinafter complained of, owned, or controlled and operated two separate, *independent,* parallel, and *competing* lines of railway. * * * (p. 202).

"At the times mentioned, these two railway systems * * * *were then engaged in active competition* with one another." (p. 203).

By the organization of the Northern Securities Company,

"all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce *formerly carried* on by the two systems as *independent competitors established.* (p. 207).

"* * * a combination or conspiracy in restraint of the trade or commerce among the several states and with foreign nations *formerly carried* on by the de-

fendant railway companies *independently* and *in free competition* one with the other has been formed. * * *." (p. 209).

(f) In the Securities Case the defense was *under* and *relying upon* the power given by the charter of New Jersey to the Securities Company, which was organized solely and only for the purpose of securing such control of both railroads as would enable it to smother the existing competition. The question in that case was *the power* of the Securities Company *to accomplish such result.* Did it lawfully have that power? It was admitted that the status of each stockholder in each of the competing railroads was changed by the transfer to the Securities Company. He lost his direct ownership in his separate railroad, which he theretofore had, and became merely an owner of Securities stock. He became, through the Securities Company, interested in two railroads as one, and the management and control of his former property was changed.

In the case at bar, the Standard Oil Company of New Jersey was a bona fide organization in 1882 to refine oil, and was in 1899, before its capital

stock was increased, the owner of large refineries and doing a large business. As the Court below found, this company was one part of the trust property of 1882-1899, which in 1899 was under the same control and management of the seven appellants as were all the other parcels of the trust group. All, including the New Jersey Standard Oil Company, were owned in common by the same persons and were not competing. Indeed, the New Jersey Standard Oil Company was organized in 1882, and was the same corporation whose capital stock was increased in 1899, and never had competed with any other one of the group.

Now by conveying to the New Jersey Corporation these non-competing properties, the men who as one group owned them all, gained no additional power, and did not in the least change the status of the properties or the status of those who were owners of them, prior to such conveyance. The properties were still held in trust for them with this change, that before the conveyance they had certificates of the trustees, afterwards stock of the Standard Oil Company. But their real interests were not changed. They did not get by the transfer an interest in other property which they did not have before, as did the Securities people. They did not get or attempt to get, by the New Jersey Charter, a power to suppress competition, either lawfully or unlawfully. There was no competition to suppress, as between the jointly held properties. The seven appellants were just as fully in control of all these properties before 1899 as after 1899, and their power over all of them

was not added to or changed, unless lessened, by conveyance to the New Jersey Standard Oil Company.

John D. Rockefeller, testifying on cross-examination, very tersely described the situation thus:

"Those who transferred their interests from the trust into these constituent companies preserved the same relation that they had sustained before in the ownership of these properties. Those who had not yet transferred, those who were from time to time transferring, yet preserved their same proportionate relation in all these properties. * * *

The same people, in the same relations, continued." (Rec. Vol. 16, p. 3190).

In a word, the main and marked difference between the two cases is:

In the *Securities Case*, the Securities Company did gain the power to smother then actually existing competition between two parallel and competing railroads, for which purpose alone it was organized and for which purpose the stocks were conveyed to it. The management of the separate railroads was changed. A new power was gained, which was additional and other than the Morgan and Hill groups ever before owned.

As the Supreme Court of Washington, in the *State of Washington vs. Cascade R. R. Co.*, 51 Wash. 346, said of the Northern Securities Case:

> "The ground upon which the decision rested was that the effect of the stock ownership by the Securities Company would be to stifle *competition which had theretofore* existed between the two railroad companies."

In the case at bar, the New Jersey Standard Oil Company did not gain any such power. There was no existing competition to smother. There was no effort or purpose to give it that power. The management of the properties conveyed to it was not changed, but was under the same seven who had it before. The trustees under the agreement of 1882 had larger powers than the Standard Oil Company of New Jersey had in 1899, when conveyance was made to it, or thereafter.

It is a true and fair statement of the ruling of the Court below to say:

> Seven men controlling for, say 5,000 people, 70 parcels of property devoted to private business enterprise, for which the 5,000 held trust certificates of trustees, in 1899 determine that thereafter the 5,000 shall hold stock certificates of the New Jersey Standard Oil Company for the same

properties, in the same proportions and with the same power and management. Neither the 5,000 owners nor the seven managers gained any new power or property or changed their status or smothered competition by the change; but they did gain, as they think, an easier and more economical method of holding and managing the joint properties. They did not intend to, nor did they, control the properties after 1899 otherwise than they managed them before, and they had no idea of restricting competition between their jointly held properties because there was none to restrict.

Yet the Court below held:

(1) That the mere transfer itself was a violation of the Sherman Act passed to further and protect interstate commerce;

and

(2) That the Northern Securities Case was on all fours with the present case, and ruled it against appellants.

Potential Competition.

Judge Sanborn says that some of the properties owned by the appellants were—

"potentially and naturally competitive;"
"natural and potential competitors;"

and their competition was prevented by their being jointly owned by the same persons, and therefore he concludes they must be treated as if they were *actually* competing, and in the decree made, it is sought to make such properties actually compete with each other.

Judge Hook (Record A, p. 587), said:

"The principal conclusions, upon which we are all agreed, may be briefly stated as follows: A holding company owning the stocks of other concerns whose commercial activities if free and independent of a common control would naturally bring them into competition with each other, is a form of trust or combination prohibited by Section 1 of the Sherman Anti-trust act."

With the greatest respect for and with full recognition of the learning and ability of the court below, we submit that the idea of competition between properties all owned by the same persons is a novelty. The idea that properties themselves compete, and that if on man owns two or more he must compete with himself, is startling. Competition between joint owners is also novel.

Fairbanks vs. Leary, 40 Wisconsin, 642, 643.

Speaking of former competitors who had united their businesses in a partnership, the court said:

"The law does not and did not require that these parties should compete in the purchase of produce."

With great respect we urge that a constructive crime under a highly penal statute is a novelty, and if it is applied, as it was in the Court below, it widens the scope of the Sherman Act and lessens the scope of the private tradesmen to an unexpected extent, and seems inconsistent with the earlier decision of the Court in *Whitwell vs. Continental Tobacco Co.* (125 Fed., 454).

Competition is the striving of two or more persons, or corporations, either individually or jointly, for one thing, i. e., trade; it is personal action; the strife between different persons. Properties do not compete. Their relative locations may more readily enable their owners to use them in competition, but of themselves and as against each other, they do not compete.

The Court below, then, probably meant that, assuming certain refineries were so located that they might be used, i. e., their product might, in the race for the trade, be used in competition, if one and the same group of persons owned two or more of such refineries, this of itself violated the Sherman Act—is a restraint of trade and tends to monopoly,—because if owned by two or more independent groups, each group would compete with each other group.

This idea makes the Sherman Act read that the same person or group of individuals shall not own and operate two or more sites for refineries or for stores or for any kind of manufactories which might be used by different owners in competition.

See this Court in the *Joint Traffic Association Case,* 171 U. S., 505, 567, quoted *infra* p. 204.

Closely looked at, it would be simply incredible that the Sherman Act could be so construed, or that any Government would so shackle and restrict trade. Read the Sherman Act and these results inevitably follow.

The words "potential" or "naturally competitive" are not in the Sherman Act. It says nothing of *potential competition or natural competition.*

(a) It is plainly not within the letter of the Sherman Act. If it is to be added, Congress must do it, not the Courts.

(b) It is not within the spirit of the Act, for the spirit of the Act is to further and increase trade, while such a doctrine would lessen and restrict it.

(c) The man who violates the Sherman Act is a criminal. If the merchant or manufacturer or trader owning one store or manufactory or plant wishes, for his increasing trade, to increase his facilities in the production or handling of his goods, see how this rule cripples him. He may not buy the adjoining lot, for it undoubtedly is—

"potentially and naturally competitive."

The natural place which would suit him would be one where he could use or operate it jointly and in connection with his other places. But this new rule forbids that. It would be folly for him not to select a new site which would accommodate the trade he had; yet under this rule he could not, for some rival of his for the same trade could use such site to compete.

If he does hazard it and selects a new site which a jury might think suitable for a rival location, he is a criminal, and liable to fine and imprisonment, besides the restrictive powers of a court of chancery.

And this, under a statute which was passed to further and increase trade.

A case inconsistent with the lower court's theory of "potential competition" is—

State of Washington ex rel. Cascade Railroad Co. vs. Superior Court, 51 Wash. 346, 98 Pac. 739 (1909).

The Great Northern and Northern Pacific railroad companies operated competing lines between Seattle and Spokane, Washington, and each desired to build an extension from Spokane to Portland, Oregon. Instead of building separate competing lines, they organized, and each subscribed for half the stock and contributed half the capital of a new railway corporation, which constructed the desired extension.

The Supreme Court of Washington held that this corporation jointly controlled was not in violation of the Sherman Act, saying:

> "It is difficult to understand how transportation facilities can be impaired when two existing separate and independent corporations, each of which continues its individual identity, organization and control, subscribe for the capital stock of a newly created corporation and thereby aid in building a railroad which opens and serves additional territory. It would appear that the creation of the new corporation, instead of curtailing the transportation facilities already enjoyed by the public, would increase the same."

That court distinguished the Northern Securities case because—

> "The ground upon which the decision rested was that the effect of the stock ownership by the Securities Company would be to stifle *competition which had theretofore existed* between the two railroad companies."

THE RULE OF POTENTIAL COMPETITION REFERS ONLY TO THE OWNERSHIP OF THE PHYSICAL PROPERTIES WHICH PRODUCE THE OIL WHICH GOES INTO INTERSTATE COMMERCE, AND NOT TO THE OIL ITSELF.

But as the physical properties do not themselves enter into interstate or foreign trade and are held under state, not federal, laws, this suggested rule of *potential* competition is unimportant in this case.

> That the Court below thought that the mere ownership by *one* of properties which, if owned by *two might* compete, violates the Sherman Act, clearly appears from the language used in the opinion, (Vol. A, pp. 578, 579):
>
> > "The principal company and many of the subsidiary corporations were then and still are engaged in interstate and international commerce, many of them were *capable* of competing with each other in that trade and *would have been actively competitive if they had been owned by different individuals or different groups of individuals.*"

But the ownership of properties is wholly under the laws of the state. Congress cannot and does not pretend to regulate their acquisition and the

rule adopted by the Court would broaden the Sherman Act so that a federal law would regulate land titles in the state.

United States vs. E. C. Knight Co., 156 U. S., 1.

The *Securities Case* (193 U. S., 197) does not justify it. There the effort was to merge two parallel and actually competing railroads whereby the competition between them for interstate traffic would be smothered and trade restricted.

Then, too, this new rule would forbid each of the competing railroads from acquiring adjacent land to widen its road-bed, or acquire additional facilities to increase its business, because perhaps some independent corporation would buy that land and build an opposing and competing railroad.

Northern Securities Co. vs. United States, 193 U. S., 407:

Holmes, J.:

"Suppose that, before either road (Great Northern or Northern Pacific) was built, Minnesota, as part of a system of transportation between the states, had created a railroad company authorized singly to build all the lines in the States now actually built, owned or controlled by either of the two existing companies * * *. The supposed company would have owned *lines that might have been competing*—probably the present one does. But the Act of Congress will not be construed to

mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end."

By this new rule of potential competition the Court below assumes:

(1) That a rival trader will buy;
(2) That he will build a refinery and operate it;
(3) That he will make the kind of product that the other man does;
(4) That he will use that product to compete with the other man for the same trade.

The Sherman Act is a highly penal one. In a criminal prosecution under the Act the degree of proof is beyond a reasonable doubt.

In a civil suit under it, the degree is not so great, but the proof must be direct, plain and convincing.

United States vs. Trans-Missouri Freight Association, 58 Fed., 77;
Northern Securities Co. vs. United States, 193 U. S., 197, 401, Holmes, J.;
State vs. Continental Tobacco Co., 177 Miss., 1.

Distinction between private traders and railroad companies.

Again Judge Sanborn says, speaking of the Securities Case and the case at bar:

> "For some time, therefore, before the transfer in each of these cases, a group of stockholders controlled a majority of the stock of *potentially competitive* corporations which they vested in the holding company, so that the latter had the power to operate them together without competition, and the rule which governs one must control the other." (Rec. A, p. 580).

Here again is the fundamental mistake which His Honor makes:

(1) His Honor says the two cases are identical because before the transfer to the Securities Company there was no *actual* competition between the two railroads.

As we have shown, this is a plain mistake. Such active competition did exist, and as we have shown *ante* pp. 38, 40, it was to smother this that the Securities Company was formed.

(2) His Honor says the two railroads were owned by the one group of men, just like all the trust properties of Standard Oil were owned, which was that each individual of the group had a like interest in both railroads.

This, we have shown *ante* pp. 37-41, is unsupported by the record in the Securities Case.

(3) His Honor overlooks this plain distinction between the two cases: Even if it had been true (which it was not) that active competition had ceased between the railroads, yet they were parallel lines, and competition of necessity arose when each sought the same freight. The two railroad companies could not agree *not* to compete or either buy up the other competing line. It was unlawful for their owners not to compete. They were *quasi*-public corporations bound to compete.

In our case we are individuals owning private trading corporations. As we jointly owned all the properties we were not bound to compete with ourselves. Even if we had been independent traders, the owner of one plant could buy another.

The plain distinction is that *two railroads* that *are* competing may not agree *not* to compete, nor can one buy the other, or cease to operate or refuse to carry freight.

On the other hand, two private traders in oils are not bound to compete; one may purchase the other, either may cease to trade, either may refuse to sell to or buy from any one he chooses.

Distinction under Sherman Act between quasi-public corporations and private traders.

Judge Sanborn, comparing the two competitive railroads in the Securities case with the different refineries in the Standard Oil case, says that—

"The act makes no distinction between them, it excepts neither class, and where Congress has made no exception it is not the province of the Court to do so. No

countervailing reason overcomes these considerations and the vesting of the majority of the stock of many potentially competitive private corporations engaged in interstate commerce in a holding company, which would be violative of the Anti-Trust Act if made by the stockholders of railway companies of that character must be subject to the condemnation of that statute." (Rec. A, p. 581).

With profound respect for the learning of the Judge of the court below, we do not comprehend how, under the cases and consistently with the principles which must govern, he can say that there is no distinction between competing railroads and private trading corporations. Each class, he asserts, is alike under the Sherman Act. One rule is applicable alike to each. But the authorities are directly to the contrary.

In the *Trans-Missouri Case*, 166 U. S., 290, Mr. Justice Peckham considered the difference between *quasi*-public corporations, such as railroad companies, and private corporations, which are really trading companies, and on pages 320, 321, he, *inter alia*, said:

"The trader or manufacturer, on the other hand, carries on an entirely private business and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction; while, on the contrary, a railroad

company must transport all persons and property that come to it, and must do so at the same price for the same service, and the prices must be reasonable, and it cannot, at its will, discontinue its business."

Again on page 324 he said:

"It is entirely appropriate generally to subject corporations or persons engaged in trading or manufacturing to different rules from those applicable to railroads in their transportation business."

Again on page 333 the learned Justice said, speaking of the railroad corporations and the business of such corporations:

"It is of such a public nature that it may well be doubted, to say the least, whether any contract which imposes any restraint upon its business would not be prejudicial to the public interests."

Again on page 333 the Court said:

"It was said in *Gibbs vs. Baltimore Gas Company,* 130 U. S., 396, at page 408, by Mr. Chief Justice Fuller as follows: 'The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. * * * Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of a contract, (*Printing & Registering Co. vs. Sampson,* L. R. 19 Eq., 462), yet in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public inter-

est, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy."

Mr. Justice Harlan in the *Securities Case* (193 U. S., 353) said:

"Railroad companies, we said in the Trans-Missouri Freight Association Case, 'are instruments of commerce, and their business is commerce itself;' and such companies, it must be remembered, operate 'public highways established primarily for the convenience of the people, and *therefore* are subject to governmental control and regulation.'"

But the Court below says the Sherman Act does not in words make any distinction between railroad corporations and private trading partnerships or corporations, and *therefore* both must be treated alike.

The answers are many:

(a) This Court, as the above authorities show, have decided to the contrary.

(b) The Sherman Act is general. It does embrace all persons, all corporations, all combinations. But it was passed only to prevent any person, any corporation, any combination, from restricting or monopolizing interstate commerce.

Private traders may buy competitive plants and this does not, the law says, *per se* and of itself restrain trade and tend to monopoly. *Yet,* if one competitive parallel railroad buys another, this of itself and *per se* is illegal, because it does restrain trade and tend to monopoly.

(c) A broad general statute as the Sherman Act does not go into detail and by the use of appropriate words lay down a special rule for each case. It recognizes the complex business life of the day and also recognizes the existence of other laws, common law and statutory law, and this new statute fits into and becomes part of the complex whole. Especially a statute like the Sherman Act does not disintegrate society or strike down other laws which bear upon the same question. Such a statute, for example, does not pretend to say to two competing railroads, You can unite, or to two competing private traders, You cannot. It does not say that that which the other laws say is legal, has become illegal; that that which the other laws say does or does not constitute a monopoly or restriction of competition, now does constitute such, and that after the Sherman Act all acts done by classes of persons have one and the same significance. It does not repeal, but assimilates itself with and becomes a part of the general mass of common law and statutory law.

United States vs. Sanges, 144 U. S., 311:

"This statute, like all acts of Congress, and even the Constitution itself, is to be read in the light of the common law, from which our system of jurisprudence is derived."

THE MERE METHOD IN WHICH STOCKS ARE HELD IS NOT PRESCRIBED BY THE SHERMAN ACT. ALL METHODS ARE LAWFUL IF NOT USED TO RESTRICT TRADE OR GAIN AN UNLAWFUL MONOPOLY.

The learned Judge says as to the Securities case:

"* * * no question of the mere acquisition or method of holding or of disposition of the title to property was there or is here in issue, that *the question* there was, *as it is here*, whether a *certain method* of holding the stocks which control several corporations may be used to prevent competition between them in interstate and international trade." (Rec. A, pp. 580-581).

But the majority opinion by Mr. Justice Harlan in that case, 193 U. S., page 335, said:

"What the Government particularly complains of, indeed all it complains of here, is the existence of a combination among the *stockholders* of *competing* railroad companies which, in violation of the Act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee designated to

act for both companies in repressing free competition between them. *Independently of any question of the mere ownership of stock* or *of the organization of a State corporation,* can it in reason be said that such a combination is not embraced by the very terms of the anti-trust act."

All methods of holding properties may as a matter of fact be used to prevent competition.

Does the Court here merely mean that *some* methods of holding titles are *more* readily used to control competition than others, and that *therefore* the Sherman Act does forbid certain methods of holding properties and carrying on business? If so, what words in the Sherman Act say so, and how can one determine what difference in degree will constitute the offence under the Sherman Act?

If one *method* of holding enables the owners to compete a *little more* easily than the other, will that be the crime, or will it require a greater degree of ease? And who shall determine it?

No matter how held or what the manner of holding, if, as a fact, the owners use the stocks in preventing competition, and without them competition could not be prevented, and with them it could and is prevented, and is prevented merely by the holding of the stocks as it was in the Securities Case; then such holding violates the Sherman Act because it gives the power to do what is unlawful, as in the Securities case, smothers active competition then being carried on between two parallel and competing railroads, and prevents the two railroads from competing in the future, as it was their duty to do.

The idea which the above excerpts seems to imply, that the mere method of holding the stocks was *itself*, and aside from the power to stifle competition, a violation of the Sherman Act, is a new reading of that much-abused and much-construed act.

His Honor not only implies, but he assumes, at least for the case, that the control of the seven through the trustees under the Agreement of 1882 of all this property was not a violation of the Sherman Act, but he holds that because, and only because, all such properties were conveyed to the Standard Oil Company of New Jersey, *that* and only *that*, and *of itself*, is a violation of the Sherman Act.

ADDITIONAL REASONS GIVEN BY THE COURT BELOW WHY THE TRANSFER TO THE STANDARD OIL COMPANY OF NEW JERSEY IN 1899 WAS A VIOLATION OF THE SHERMAN ACT—

Aside from the decision in the Northern Securities Case what other reasons did the Court below give why the mere transfer to the Standard Oil Company of New Jersey in 1899, as made, *of itself* and *by itself*, was a violation of the Sherman Act?

Its reasons we give in its own words:

"But the power of the principal company, after the transfer of 1899, to fix the prices at which the *thirty corporations* should buy and sell the articles in which

they dealt, the terms of their purchases and sales, their rates for the transportation of oil and its products, and all the infinite details of their vast operations in which they might compete, and thereby to prevent their competition, was greater, more easily and quickly exercised and hence more effective than it could have been in the hands of 3,000 scattered stockholders. The trust deed of 1879, the trust agreement of 1882, the withholding of the separate certificates of shares of stock in each corporation from the holders of the trust certificates in the dissolution of that trust until they took their shares in all of the corporations, bear convincing testimony to the soundness of this proposition. The combination formed by that transfer and its power to restrict competition were less liable to be destroyed, more reliable and permanent than those springing from the joint ownership by three thousand stockholders of each corporation." (Rec. A, p. 582).

The Court below then did not claim that the assignment to the Standard Oil Company gave that company any new or additional power to stifle competition than it had before, for it said:

"Counsel argue with persuasive force that the transfer of the stock of the nineteen corporations to the principal company wrought no substantial restriction of competition because the owners of that stock had and exercised the same power of restraint before that transfer that was vested in the Standard Oil Company of New Jersey thereafter." (Rec. A, p. 582).

Then follows the previous quotation.

UNDER THE COURT'S RULING THE EFFECTIVENESS OF A LARGE BUSINESS ORGANIZATION MAY, BY REASON OF THAT VERY FACT, BRING IT UNDER THE SHERMAN ACT.

Now here is the new test as to whether a business comes under the Sherman Act. It merely depends on how it is organized.

Take any large private business, whatever its organization, as a trust or partnership. It desires to re-organize to more economically and easily handle its business, but it does not give to the new reorganization any additional power it did not before have, or change the persons who own it and its properties, or change its management. Yet, if by this new re-organization, it could the more easily and quickly fix prices and the terms of purchase and sale, the rates for transportation of its products, and all the infinite details of its vast operation in which it might compete and thereby prevent competition, it is, the Court below says, a violation of the Sherman Act, not because it prevents competition by outsiders, but merely because it prevents competition *between the jointly held properties.*

Why?

The court below said:

Because—

(1) The power of the Standard Oil Company to fix *prices* at which the thirty corporations should buy

and sell the articles in which they dealt, the terms of their purchases and sales,

(2) their rates for the transportation of oil and its products,

and

(3) all the infinite details of their vast operations

"in which they might compete,"
"and thereby to prevent their competition,"

(4) was greater, more easily and quickly exercised and hence more effective than it could have been in the hands of 3,000 scattered stockholders.

(5) The combination was less liable to be destroyed,

(6) more reliable and permanent than those springing from joint ownership by 3,000 stockholders of each corporation.

It will not be forgotten that the court below assumed (at least for the present) that the 3,000 *cestuis que trustent* of the 1882 trust in 1899 lawfully owned all the trust property, and lawfully held it through trust certificates.

That they through their *trustees* were lawfully carrying on interstate commerce.

That the seven individual defendants controlled the trust.

That the trust which was held by nine trustees and their survivors for the lives of the nine trustees, and twenty-one (21) years thereafter, might lawfully endure and transact

business for all of that time, and there was no duty on the part of the *cestuis que trustent* to dissolve the trust and divide the property.

That there was no evidence to show any move towards such a trust dissolution.

That by the transfer to the Standard Oil Company of New Jersey the *cestuis que trustent* gained no additional power or property.

That before the transfer all the properties were operated as if owned by one person, and after the transfer they were still so operated.

That being owned jointly and equally in proportion to the individual interest, each of the 3,000 held an interest in each parcel of property and there was no duty of competition between joint owners.

And yet

this lawful, peaceable group of owners violated the Sherman Act by conveying all of their property to a lawful corporation authorized by state laws to receive it, and taking for the same stock certificates in such corporation instead of trust certificates,

because

such transfer enables the Standard Oil Company to fix more easily the prices at which it would buy and sell articles in which it dealt and the terms of such purchases and sales, and the rates of transportation, and all the infinite details of its vast operations.

Is this so?

The trustees under the 1882 trust had all such powers and the vast business was carried on through them. When the properties were conveyed to the New Jersey Standard Oil Company all this business had still to be handled by men called officers and directors instead of trustees. The seven individual appellants, the court held, controlled the corporation as they did the trustees and so the ultimate management was the same.

It is by no means certain that the duration of the business under the corporate form would be longer than under the trust form, which was for the period of nine lives and twenty-one years with power of restating the same trust at the end of that time.

As to its stability, the same doubt may with even greater reason be urged, and as to the *power*, surely if there be aught of difference, the trustees had more power than the officers and directors of the Standard Oil Company.

To some extent, a corporate form of organization is preferable to an individual enterprise through trustees, and business may be more accurately and more economically and more easily carried on, but surely this does not violate the Sherman Act. It is wholly a matter of comparison as to the economy and facility with which the same enterprise or business may be carried on, and it gives no power of restraining competition of other traders or unlawfully monopolizing the trade of others in addition to that held by the owners under the trustee form. And the court below did not hold it did. It was not because this corporate form of organization enabled the Standard Oil Company to more effectively restrain competition by others in the interstate trade or unlawfully monopolize trade of others that the court condemned it, but

because

disintegration of the trust with 3,000 *cestuis que trustent* was *more likely* to take place than if the same 3,000 held their properties through stock in the Standard Oil Company.

The joint owners were more likely to divide their joint properties and become competitors if they continued under a trust than if they held stock in the Standard Oil Company.

The power of the combination was more effective and more easily and quickly used as the Standard Oil Company than as a trust.

The court admitted that though the property of the Standard Oil Company was large and gave great power in competing for interstate trade or in monopolizing part thereof, such restraint of competition and monopoly were lawful under the Sherman Act if acquired by lawful means in the pursuit of competition.

"* * * monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law and may not be forbidden by the courts."

Sanborn, J., Record A, page 585.

"Magnitude of business does not, alone, constitute a monopoly, nor effort at magnitude an attempt to monopolize."

Hook, J., Record A, p. 589.

We insist that:

If a private trading business enterprise carried on under the form of a trust or partnership sees fit for purposes of economy and the more easy and efficient transaction of its business to organize as a corporation under state laws, this does not violate the Sherman Act.

The Sherman Act (Section 1) provides:

"Every *contract, combination* in the *form of trust* or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

This section denounces only *restraints* of trade. No matter how restrained, it is denounced. But this section does not attempt to define how individuals engaged in interstate trade shall hold their properties or whether they shall carry on trade under a partnership or a trust or a corporate form. It leaves all such questions to the individuals and to state laws. All of them are legal, but none of them can be used to restrict trade.

The section does not discriminate as to what form of organization could probably be more easily used to restrict trade, and then denounce such form. But it allows all forms to be lawfully used.

Section 2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce," etc., etc.

is guilty of a crime.

Whatever be the true interpretation of this section, it can with confidence be said that it does not attempt to regulate the method in which traders shall hold their properties or organize their business enterprises.

Clearly, then, so far as the *words* of the Sherman Act are concerned, the court below erred in holding that the transfer to the Standard Oil Company in 1899 was a violation of it.

It is equally clear that it is not within the intent of the Act, for to gather such intent would be inconsistent with the words of the Act which plainly show the contrary intent, i. e., not to interfere with methods of holding properties or form of carrying on business.

To declare that such is the intent of the Act would be to say that Congress attempted to regulate the methods of holding properties and carrying on business, which power never was given to Congress but was left with the States.

Fuller, C. J., said in the *Knight Case,* 156 U. S. 16, that Congress did not attempt by the Sherman Act to

> "*assert the power* to deal with *monopoly* directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property * * * *or to make criminal* the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted."

Northern Securities Co. vs. United States, 193 U. S., 197, 346, Harlan, J.:

> "The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company."

Kidd vs. Pearson, 128 U. S., 1.

RESTATEMENT OF DIFFERENCES BETWEEN THE NORTHERN SECURITIES CASE AND THE CASE AT BAR.

(a) The Northern Securities Company was given a power which before its organization did not exist, i. e., it practically merged the two separate competing railroads into one, and thus has the power to stifle competition.

(b) *Before* the conveyance to the Securities Company, there were two independent, actually competing railroads owned separately by two independent competing groups, which by the conveyance to the Securities Company were united into one group.

(c) *Before* the conveyance, each individual of each group owned a certain interest in his one railroad, but *after* the conveyance he owned an interest in both of the railroads.

(d) *Before* the conveyance the interest of each stockholder in his own separate railroad led him to favor competition with the other railroad, whereas *after* the conveyance he had no such interest.

(e) *Before* the transfer each stockholder of, say, the Northern Pacific, owned his shares as one in a body of, say, one thousand stockholders; *after* the transfer he was one of a body of, say, two thousand shareholders in a new and distinct corporation.

Thus the status of each railroad and each stockholder was radically changed.

Whereas in the case at bar:

Before the conveyance of 1899 to the New Jersey Standard Oil Company all the property conveyed to that Company was managed and controlled by the identical seven men with the same powers, who after the conveyance still controlled, just as before. They gained no additional power by the transfer. The Standard Oil Company gained no additional power that the trustees did not have prior to that transfer. The individuals who through trust certificates *before* the transfer owned proportionately all the property, *after* the transfer, through stock of the Standard Oil Company, still owned the same property in the same proportions. No one gained an interest in any other property than that in which he had an interest *before* the transfer.

Before the transfer the trust certificate holders numbered, say, 5,000, and *after* the transfer the stockholders still numbered the same.

Before the transfer the nine trustees held and the seven defendants managed a group of non-competitive properties. Each certificate holder then owned and had a common interest in each one of the group. As such joint owners they were not bound to split up the one united group into distinct competitive groups. They might lawfully hold and operate the whole group as a unit. These certificate holders owned the one united group *after* the transfer as before. It was non-competitive *before* the transfer. It remained so *afterwards.* The owners of the one united group were not morally or legally bound to disintegrate the one united non-competitive group either before or after the transfer.

Thus the status of the owners and of the properties with whatever powers they had, was not changed by the transfer.

There are no other facts found by the Court upon which a decree could be rested.

The finding of fact by the Court other than that contained in the decree starts with John D. Rockefeller owning the refinery in Cleveland in 1865, tracing his course in connection subsequently with others, and stating that Rogers, Archbold, Payne and Pratt joined the Rockefellers and Flagler, and that they organized the Standard Oil Company of Ohio, and increased its capital stock to $3,500,000, and stating that the Standard Oil Company of Ohio had become the owners of—

> "more than forty competitive refineries located respectively in Cleveland, Pittsburgh, Titusville, Parkersburg, Baltimore, Philadelphia, Bayonne, New York Harbor, Boston and other places, and the ownership of the entire interest or of a controlling interest in more than thirty companies." (Rec. A, p. 573.)

In this finding the Court did not allege that these refineries were acquired in any other than a lawful business way. It did not pretend to allege that there was any conspiracy to defraud or conspiracy to cause a monopoly by which they were obtained.

Then comes the Vilas, Keith & Chester Trust of 1879, and the Trust of 1882, both of which are described, but no opinion is passed upon either by the Court below. The Court did not declare either to be unlawful. Then follows the recital of what happened after the decision of the Supreme

Court of Ohio in 1892 and the manner of the dissolution of the Trust; and then the increase of the capital stock of the Standard Oil Company of New Jersey and conveyance to it in 1899 by the different parties in interest of the same properties that had been in the Trust of 1882.

In a brief way the assets and business of this Standard Oil Company of New Jersey are described, and then it is stated that the Standard Oil Company of New Jersey

> "is using the power to prevent competition between the companies it controls * * * between its subsidiary companies and between those companies and itself." (Rec A, p. 576-577).

It is not found that this Standard Oil Company has the power or is exercising it to prevent competition among outside companies, or with outside companies, or that it is using illegal means to acquire a monopoly of the trade. The Court finds that the seven individual appellants—

> "* * * prior to 1879 * * * combined to secure and obtained the control of companies competing in interstate commerce in oil and suppressed their competition, that they caused the formation and execution of the trusts of 1879 and 1882, that they directed and followed that unique method of distributing the stock held in the latter trust by which it was not distributed to the majority of the stockholders for many years after 1892, while they and their associates held the control of it and of the corporations it commanded, that they caused the stockholding trust of 1899, and that by means of that trust they still hold the actual control and direction of the Standard Company and of its subsidiary corporations and that since 1899 they have been and still are engaged in carrying into effect and executing that trust." (Rec. A, 577).

It will here again be noticed that the Court did not find as against these appellants that they had been guilty of any fraud or unlawful conduct. The court did not use the word *conspire,* but only used the word *combine,* as to the co-operation prior to 1879. The combination prior to 1879 and even now by which several private traders united—

> "to secure and obtained the control of companies competing in interstate commerce in oil and suppressed their competition,"

was and is perfectly legitimate and proper if it was done by *lawful* means. The Court does not find that it was done by *unlawful* means.

Websted defines *combine*:

> "To form a union—to agree—to coalesce."

He defines *conspiracy*:

> "A combination of men for evil purpose—an agreement between two or more persons to commit a crime in concert."

All the charges in the bill that this combination was fraudulent and that, through unlawful rebates and by unlawful control of railroads and by various and divers unlawful acts, it acquired a control of these refineries, are disallowed by the Court. The Court does not find any such averments to be true. They were denied in the answer. They are not found in the opinion or decree below.

So if the position which we have hereinbefore argued be correct, that the Court erred in holding that the transfer

to the Standard Oil Company of New Jersey in 1899 was a violation of the Sherman Act, then there is nothing else in the findings of fact or in the decree of the Court which would justify a decree against the appellants.

III.

DECREE.

THE COURT ERRED IN ENTERING THE DECREE WHICH IT DID,

because

(a) The decree was not justified by the facts found by the court;

(b) The decree was not authorized by the Sherman Act;

(c) After the court in Section Five permitted the distribution among the shareholders of the Standard Oil Company of New Jersey of the stocks held by that company, it did without lawful authority so to do:

(1) Define and limit the method of that distribution;

(2) Restrict the distributees in the future sale, use and disposal of their stocks;

(3) Restrict the distributees in the sale, use and disposal of their properties;

(4) Restrict the distributees in the contract relations thereafter to exist between the owners of one property and the owners of another;

(5) Tie up and restrict the use and disposition of the different properties in such a drastic manner as to greatly injure and destroy the value of the same and render their future profitable use practically impossible;

(6) Disintegrate properties, built with the moneys of the Appellants for joint use so as to create units that never before existed and compel these units separately to carry on business and compete with other units, directly contrary to the purpose of their creation;

(7) Allow the future operation and use of the refineries, pipe lines, and other properties of the appellants only under the vague and indefinite, but broad and comprehensive, terms of Section Six of the decree, and thereby subject those who in the future operate the said refineries, pipe lines and other properties to attachment for contempt for the unwitting violation of the vague and indefinite terms of said Section Six;

(8) Prohibit the appellants from engaging in all interstate commerce until the discontinuance of the operation of the illegal combination, thus inflicting a new penalty for an indefinite and uncertain period.

All of such restrictions are unauthorized by the Sherman Act, are in violation of the settled rules governing injunc-

tions, and are contrary to the provisions of the different decrees heretofore approved by this court under the Sherman Act, and especially the one in the Northern Securities case.

NORTHERN SECURITIES DECREE.

We have just demonstrated (pp. 16 to 21) that the Court below decided this case on that of the Northern Securities Company. On p. 19, *supra,* Judge Sanborn says, comparing the present case with the Securities Case, that—

"The Act makes no distinction between them."

And again, p. 54, *supra,*

"* * * the rule which governs one must control the other."

If so, should not the decree be the same in each case?

In the Securities Case the decree (printed *infra,* pp. 88 to 90) was wholly prohibitory.

It dealt alone and solely with the *then status.* It did not seek to control either of the railroad companies or the stockholders *after* the allowed distribution. It did not seek to control the *method* of distribution but left that to the Northern Securities Company.

Harriman vs. Northern Securities Co., 197 U. S., 289-290.

But in the case at bar:

The Court below (as we hereafter prove) substantially followed the Securities decree down to and including the portion allowing the distribution among the stockholders, and then added Sections VI. and VII. containing the most drastic provisions, which so tie up and restrict the uses of our properties as to greatly damage and injure the same.

If, as the Court below averred, the two cases are alike, and the same rule should govern each, why this marked *distinction?*

The decree authorized by the Sherman Act is one that merely enjoins—stops an illegal thing in operation when the petition is filed or which then is foreseen.

It is wholly negative.

The fourth section of the Sherman Act gives the Federal Courts power *"to prevent and restrain violations of this act."* The only jurisdiction given is to stop something going on—something being done when the petition is filed.

That section reads:

"The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such tem-

porary restraining order or prohibition as shall be deemed just in the premises."

Primarily *"to prevent"* means to hinder something that hereafter is to take place; the word *"restrain"* bears its own plain meaning of pulling back that which is in actual motion; which is then being done.

So when you say that a court may *prevent and restrain,* you necessarily consider only, and restrict yourself to, the present and the future. You cannot either *prevent* or *restrain* a thing that was done twenty years or one year ago; you can prevent and restrain that which is now in operation and continuing, but it is simply impossible to prevent and restrain that which has been done.

This Court said in *Lacassagne vs. Chapuis,* 144 U. S., 124:

"The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already."

Not only do these words *prevent* and *restrain* demonstrate this, but the same section adds that proceedings to enforce the Act may be by way of

"petition setting forth the case and praying that such violation shall be *enjoined* or otherwise prohibited;"

and then it adds that the courts may

"make such temporary restraining order or prohibition as shall be deemed just in the premises."

Twice the expression is "prevent and restrain;" then the word "enjoin;" then the phrase "restraining order" and the word "prohibited" and "prohibition." Each one of these can only mean to give jurisdiction over a present continuing or then foreseen violation of the Act.

Every word is prospective; not one retrospective.

Besides, the Act itself clearly shows two remedies given for the misdemeanor; the one is the ordinary criminal remedy to punish for what has been done, and the other is the extraordinary and unusual remedy of preventing and restraining the commission of a misdemeanor now in action and being done, which is a violation of the Act.

In the *Knight Company Case* (156 U. S., 1, 17), Fuller, C. J., said that the Sherman Act

> "only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the Act in respect of contracts, combinations or conspiracies in restraint of interstate or international trade or commerce."

In *Harriman vs. Northern Securities Company,* 197 U. S. 244, 289, Fuller, C. J., quoted with approval the comment of Judge Thayer on the decree in the latter's opinion in 128 Fed. 808:

> " 'The decree was *wholly prohibitory.* It enjoined the doing of certain threatened acts.' "

Swift & Co. vs. United States, 196 U. S., 375, 402: Holmes, J., said the decree issued

> "*restrains* such combinations *only* to the extent of *certain specified devices* which the defendants are alleged to have used and intend to continue to use."

In *United States vs. Reading Company et al.* a case under Section 4 of the Sherman Act, decided by the Circuit Court of the Third Circuit on December 8, 1910, Judge Gray said:

> "The injunction or restraining order specifically prayed for in the petition should be granted, so far as it will serve 'to prevent and restrain' the future or continuing violation of the act. This is the only jurisdiction conferred upon the court in such a proceeding as the one before us, and there can be no injunctive relief granted, unless it tends to restrain some *specific future or continuing violation* of the act."

The Sherman Act prescribes certain specific methods of relief which are exclusive of all others.

Noyes on Intercorporate Relations (2nd Ed. of 1909) Sec. 406. says of the Sherman Act:

> "The statute, being *penal* in its nature, must be *strictly construed.* It imposes new liabilities and *provides particular modes of redress,* both for the public and the individual, and the methods so prescribed are exclusive."

Greer, Mills & Co. vs. Stoller, 77 Fed., 1, 3:

"The statute, being highly penal in its character, must be strictly construed; and, having created a new offense, and imposed new liabilities, and having provided the modes of redress to the public and the private citizen, by established rules of construction, *these remedies are exclusive of all others.*"

In *Minnesota vs. Northern Securities Co.*, 194 U. S. 48, 71, Mr. Justice Harlan, in holding that a state could not file a bill in equity under section four, said:

"Congress has *prescribed a specific mode for preventing restraints* upon it (interstate commerce)."

Barnet vs. National Bank, 98 U. S., 555, 558:

"Where a statute creates a new right or offense, and provides a *specific remedy* or punishment, they alone apply. Such provisons are *exclusive.*"

East Tennessee, etc. R. R. Co. vs. Southern Telegraph Co., 112 U. S., 306, 310:

"The remedy is statutory only, and every court which takes jurisdiction for its enforcement is limited *in its powers* by the statute under which alone it can act."

Farmers' & Mechanics' Nat. Bank vs. Dearing, 91 U. S., 29, 35:

"Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes."

United States vs. Union Pacific Railroad Company, 98 U. S., 569:

An Act of Congress directed the Attorney-General to institute a suit in equity in the name of the United States against the Union Pacific Railroad Company, and all persons who had received stock in it without paying full value, or profits from construction contracts or bonds or lands, which should have been accounted for to the company. The purpose of the bill was for discovery, and the restoration to the company of such moneys and property.

The Supreme Court sustained a demurrer to the bill on the ground, among others, that the relief asked was not within the terms of the act.

Mr. Justice Miller said that it was—

"clear that any bill brought by the Attorney-General under the fourth section of the act of 1873 must be *limited* by the provisions of that act, both as to the grievances on which it counts and the *relief* which it seeks."

Mr. Justice Miller further said:

"Congress might also have directed the Attorney-General, either as part of this proceding or as an independent one, to ask the court to declare the franchises of the company forfeited. It might have ordered a bill to inquire if the company was insolvent, and if so, to wind up its affairs and distribute its assets. In short, there are many modes in which the legislature could have called into operation all the judicial powers known to the law. But it has not done so, and that is the constantly recurring answer to this bill. It provided in

the statute for a mode of securing a full inquiry into the affairs of the company, by enacting that the Secretary of the Treasury should have free access to all its books and correspondence,—a mode of obtaining information far more effective than a bill of discovery. The statute, therefore, did not authorize a bill of discovery. * * * It limited the relief to be granted under this act, therefore, both by the terms in which it was granted and by other provisions, to the recovery of a moneyed decree, or a restoration of specific property to which the United States or the company was by law entitled."

THE DECREES THAT HAVE BEEN MADE UNDER THE SHERMAN ACT.

In *United States vs. Trans-Missouri Freight Association,* 166 U. S., 290, the Supreme Court did not itself make or pass upon the decree finally entered. It reversed the decree of the Circuit Court dismissing the petition, and directed the Circuit Court to enter a decree in accordance with its opinion..

The decree subsequently entered by the Circuit Court specifically defined the combination enjoined and limited its scope to the acts mentioned. This decree was not appealed from, and is not officially reported; but the following excerpts from it were quoted on page 376 of the Brief on the

Law filed by the Government in this Court at the time of the first argument:

> "from further agreeing, combining, conspiring, or acting together to *maintain rules, regulations, and rates for carrying freight upon their several lines of railroad* so as to hinder trade and commerce between the States and Territories of the United States; and that said defendants last named, and each of them, be, and they hereby are, perpetually enjoined and prohibited from entering into or continuing in any combination, association, or conspiracy to deprive the people engaged in trade and commerce between and among the States and Territories of the United States of such *facilities and rates and charges of freight transportation* as will be afforded by free and unrestricted competition between the several lines of railroad owned or operated by said last named defendants."

Addyston Pipe & Steel Co. vs. United States, 175 U. S., 211.

The Circuit Court of Appeals reversed the decree of the Circuit Court, dismissing the bill and instructing the latter to enter a decree,

> "perpetually enjoining the defendants from *maintaining the combination* in cast-iron pipe *described* in the bill and substantially admitted in the answer, and from doing any business *thereunder.*"

The Supreme Court modified this decree so as not to include combining in regard to contracts for selling pipe within the state, and affirmed the decree as so modified.

It will be remembered the agreement was to restrain competition and fix non-competitive prices, among independent competing dealers, owning separate plants, which were competing when the combination was made.

In *Northern Securities Co. vs. United States,* 193 U. S., 197, 255, the Supreme Court affirmed the decree of the Circuit Court, which was as follows:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' denounces as illegal.

"That all the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be owned and held by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States.

"That the Northern Securities Company, its officers, agents, servants and employes be and they are hereby *enjoined* from *acquiring,* or attempting to acquire further stock of either of the aforesaid railway companies.

"That the Northern Securities Company be *enjoined* from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein.

"That the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents be and they are hereby respectively and collectively *enjoined* from permitting

the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies.

"And that they, together with their officers, directors, servants and agents, be likewise *enjoined* and respectively *restrained* from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railways companies which it now claims to own and hold;

"And that the aforesaid railway companies, their officers, directors, servants and agents, be *enjoined* from permitting or suffering the Northern Securities Company or *any of its officers or agents*, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, The Northern Securities Company, may have herteofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

In the majority opinion Mr. Justice Harlan said (p. 346):

"The Federal court may not have power to forfeit the charter of the Securities Company; it may not de-

clare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company."

From the report of *Harriman vs. Northern Securities Company*, 197 U. S., 244, 299, it appears that the directors of the Northern Securities Company voluntarily adopted a resolution distributing the shares of the Northern Pacific and Great Northern ratably among its stockholders.

On page 289 Chief Justice Fuller quoted with approval the following comment of Judge Thayer on the decree in his opinion (128 Fed. 808), refusing the application of Harriman *et al.* for leave to intervene after the Supreme Court had affirmed the decree:

> "'*The decree was wholly prohibitory. It enjoined the doing of certain threatened acts.*' * * * In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. * * *"

Swift & Company vs. United States, 196 U. S., 375.

The Supreme Court affirmed the decree of the Circuit Court, making perpetual a preliminary injunction. The injunction as modified by the Supreme Court included com-

bining to obtain rebates from common carriers, and was as follows:

"And now, upon motion of the said attorney, the court doth order that the preliminary injunction heretofore awarded in this cause, to restrain the said defendants, and each of them, their respective agents and attorneys, and all other persons acting in their behalf, or in behalf of either of them, or claiming so to act, from entering into, taking part in or performing any contract, combination or conspiracy, the purpose or effect of which will be, as to trade and commerce in fresh meats between the several States and Territories and the District of Columbia, a restraint of trade, in violation of the provisions of the act of Congress approved July 2nd, 1890, entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies,' either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock; or collusively and by agreement to refrain from bidding against each other at the sales of live stock; or by combination, conspiracy or contract raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents; or by curtailing the quantity of such meats shipped to such markets and agents; or by establishing and maintaining rules for the giving of credit to dealers in such meats ***as charged in the bill,** the effect of which rules will be to restrict competition; or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers, **as charged in the bill,** the effect of which will be to restrict competition; †[or by any other

*Words in heavy type inserted by Supreme Court.

†Words in brackets stricken out by Supreme Court.

method or device, the purpose and effect of which is to restrain commerce as aforesaid]; and also from violating the provisions of the Act of Congress approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints, or monopolies, by combining or conspiring together, or with each other and others, to monopolize or attempt to monopolize any part of trade and commerce in fresh meats among the several States and Territories and the District of Columbia, by demanding, obtaining, or, with or without the connivance of the officers or agents thereof, or of any of them, receiving from railroad companies or other common carriers transporting such fresh meats in such trade or commerce, either directly or by means of rebates, or by any other device, transportation of or for such means, from the points of the preparation and production of the same from live stock or elsewhere, to the markets for the sale of the same to dealers and consumers in other States and Territories than those wherein the same are so prepared, or the District of Columbia, at less than the regular rates which may be established or in force on their several lines of transportation, under the provisions in that behalf of the laws of the said United States for the regulation of commerce, be and the same is hereby made perpetual."

The decree, as Mr. Justice Holmes said (p. 402),

"restrains such combinations only to the extent of *certain specified devices*, which defendants are alleged to have used and intend to continue to use."

This court struck out the words *"or by any other method or device the purpose and effect of which is to restrain commerce as aforesaid."*

This clause so stricken out is in effect the same as portions of the sixth section of the decree in this case, as see the expressions

"any like combination or conspiracy, the effect of which is * * *;"

also

"by any similar device,"

"which will have a like effect."

United States vs. Chesapeake & Ohio Fuel Co., 105 Fed., 93:

The defendants were the members of an association of coal producers, and a fuel company, who had made a contract by which the fuel company agreed to sell all the coal of the members of the association at prices to be fixed by a committee of the association, and to account to the association for the same. The decree was that the defendants

"* * * be enjoined from selling or shipping under this contract coal or coke into any state other than the state in which they reside, and the contract, in so far as it affects interstate trade and commerce, is declared to be void and illegal, and the combination of the defendants thereunder will be dissolved."

The decree was affirmed by the Circuit Court of Appeals in 115 Fed., 610.

United States vs. American Tobacco Co., 164 Fed., 700.

The *Tobacco case* is now before and so recently argued in this court that it need not be cited at length. In that case for the first time under the Sherman Act, participation in inter-state commerce was enjoined.

But the defendants were enjoined from engaging in interstate commerce

> "in leaf tobacco or the products manufactured therefrom, or articles necessary or useful in connection therewith"

only, and not from engaging in interstate commerce generally.

Analogy of Decree under Interstate Commerce Act.

New Haven Railroad Company vs. Interstate Commerce Commission, 200 U. S., 361.

Interstate Commerce Commission filed a bill in equity alleging that the Chesapeake & Ohio Railway Company was purchasing and transporting and selling coal at a price per ton which, after deducting the cost of purchase and the cost of delivery, amounted to less than the published freight rate for coal.

The Supreme Court held that these acts amounted to an undue preference in violation of the Interstate Commerce Act. That Court, however, limited the injunction granted to the specific offense charged and the relief took the form of

> "perpetually enjoining the Chesapeake & Ohio from taking less than the rates fixed in its published tariff of freight rates, *by means of dealing in the purchase and sale of coal.*" (p. 405).

The Interstate Commerce Commission had taken a cross appeal in this case, claiming that the Court

> "should have further enjoined and restrained the Chesapeake and Ohio Railway Company from *giving* to said

railroad company, or to *any other person,* firm, or company, *any undue or unreasonable advantage or preference,* and should further have restrained and enjoined the Chesapeake and Ohio Railway Company *from transporting coal from one State to or through any other State* for the New York, New Haven and Hartford Railroad Company, or for any firm, person or company, at a *less rate than the duly established freight rate* of the said railway company in force at the time, and from further failing to observe its published tariffs, or *from giving* to the said New York, New Haven and Hartford Railroad Company, or to *any person, firm, or company,* in any manner whatsoever, *any undue or unreasonable preference or advantage.*" (p. 403).

The Supreme Court refused this form of decree, and, in its opinion, Mr. Justice White said:

"The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. *In other words the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. Swift & Company vs. United States,* 196 U. S., 375. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The require-

ment of the act to regulate commerce that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *In re Debs,* 158 U. S., 564, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen." (p. 404).

The decree itself must be plain, defining exactly the things which the appellants are prohibited from doing.

The Supreme Court of the United States in *Swift & Company vs. United States,* 196 U. S., 375, 396, 402, in considering the decree of the court below in the above case, said:

> "we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. * * * So modified, it (the decree) restrains such combinations *only to the extent of certain specified devices which the defendants are alleged to have used and intend to continue to use.*"

In the *Addyston Pipe Case,* 175 U. S., 247, the Circuit Court limited its injunction to the particular "combina-

tion * * * described in the bill." The Supreme Court further restricted this decree so that it would not include combinations concerning intrastate business.

Lyon vs. Botchford, 25 Hun. (N. Y.), 57:

"It seems to us that the injunction order, at least in those two particulars, exceeded the office of an injunction, which should show upon its face all those things which it is necessary for the defendant to know in order to obey it, and should plainly indicate to the defendant specifically all the acts which he is thereby restrained from doing without calling upon him for inferences, or any conclusions only to be arrived at by a more or less uncertain process of reasoning, and about which the parties might well differ in opinion either as to the facts or law. The act prohibited must be the doing of some tangible or distinct thing, or series of things, to be clearly pointed out and described. * * * An injunction should in itself contain sufficient to apprise the party what he is restrained from doing without resorting to the bill on file. (*Sullivan vs. Judah,* 4 Paige, 444.) Its language should be so clear that an unlearned man can understand it without employing counsel. (*Laurie vs. Laurie,* 9 Paige, 234; *Moat vs. Holbein,* 2 Edw., 188.) It should be so expressed that defendants may distinctly understand what is prohibited. (*Clark vs. Clark,* 25 Barb., 76.)"

Laurie vs. Laurie, 9 Paige, 234:

Chancellor Walworth:

"As the defendant is bound to obey the process of the court at his peril, the language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning, without the

necessity of employing counsel to advise him what he has a right to do to save him from subjecting himself to punishment for a breach of the injunction. And the language of the writ should at the same time be so restricted as not to deprive him of any rights which the case made by the bill does not require that he should be restrained from exercising."

Robinson vs. Clapp, 65 Conn., 365, 396:

"The court also erred in granting an injunction in so indefinite terms. It is impossible to lay down any precise rule of universal application upon the subject. But *the person enjoined is entitled to know with reasonable certainty what acts he may and may not do* without making himself liable as in contempt of an order."

Moat vs. Holbein, 2 Edw. Ch., 188;
Sullivan vs. Judah, 4 Paige, 444.

The decree of the Court below in the case at bar.

Briefly stated this decree finds and decrees as follows:

(Rec. A, p. 525):

Section One (1)—

That *since* 1890 the defendants conspired to increase, and did in 1899 increase, the capital stock of

the Standard Oil Company of New Jersey to $100,000,000, and to this company caused to be conveyed control of the nineteen (19) companies, taking in exchange its (Standard Oil Company) capital stock, and thus enabled the Standard Oil Company to control all the subsidiary companies and to manage their trade without *competition among themselves,* as the trade and business of a single person.

This of itself, the decree finds, was a conspiracy in restraint of trade and commerce forbidden by the Sherman Act.

Section Two (2)—

That the seven individual defendants united with the Standard Oil Company to form and effectuate this combination, and they, with the thirty-seven (37) named subsidiary companies, have become parties to and are now carrying out the combination, and thus (and thus only) have conspired to monopolize and have monopolized a substantial part of inter-state and foreign commerce.

Section Three (3)—

Names the defendants as to whom the Petition is dismissed.

Section Four (4)—

Names all of the subsidiary companies for whose stocks or properties the stock of the Standard Oil Company was exchanged and finds that the Standard Oil Company manages all these properties without competition between them and as the property of a single person.

Now comes the punitive part of the Decree.

Section 5:

"That the stocks of the various corporations which are named in Section 2 and described in Section 4 of this decree held by the Standard Company were acquired and are held by it by virtue of the illegal combination."

(a) That the Standard Oil Company is
"enjoined and prohibited from voting any of the stock in any of the subsidiary companies named in Section 2 of this decree,"

and

"from exercising or attempting to exercise any control, direction, supervision or influence over the acts of these subsidiary companies by virtue of its holding of their stock."

The *subsidiary* companies are enjoined

(b) from paying any dividends to the Standard Oil Company on such stocks;

(c) from permitting the Standard Oil Company to vote stock in or direct the policy of or exercise any control over the corporate acts of such companies—

"by virtue of such stock, or by virtue of the power over such subsidiary corporation acquired by means of the illegal combination;"

But—

"the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled

in the stocks of the defendant corporations that are parties to the combination."

Section 6:

"That the defendants named in Section 2 of this decree, their officers, directors, agents, servants and employees are enjoined and prohibited from continuing or carrying into further effect the combination adjudged illegal hereby and from entering or performing any like combination or conspiracy the effect of which is, or will be, to restrain commerce in petroleum or its products among the states, or in the territories, or with foreign nations, or to prolong the unlawful monopoly of such commerce obtained and possessed by defendants as before stated, in violation of the Act of July 2, 1890, either (1) by the use of liquidating certificates, or other written evidences, of a stock interest in two or more potentially competitive parties to the illegal combination, by causing the conveyance of the physical property and business of any of said parties to a potentially competitive party to this combination, by causing the conveyance of the property and business of two or more of the potentially competitive parties to this combination to any party thereto, by placing the control of any of said corporations in a trustee, or group of trustees, by causing its stock or property to be held by others than its equitable owners, or by any similar device, or (2) by making any express or implied agreement or arrangement together, or one with another like that adjudged illegal hereby relative to the control or management of any of said corporations, or the price or terms of purchase, or of sale, or the rates of transportation of petroleum or its products in inter-state or international commerce, or relative to the quantities thereof purchased, sold, transported, or manufactured by any of said corporations which will have a like effect

in restraint of commerce among the states, in the territories and with foreign nations to that of the combination the operation of which is hereby enjoined."

What the Decree Does.

The purpose of the decree, as Judge Hook in effect says, is to compel the disintegration of the group of properties which are used as one whole, and which were in large degree built by the appellants for a joint use so that hereafter there will be many units, each standing alone.

Look at what it does:

The Standard Oil Company of New Jersey lawfully owns properties worth many millions. No one disputes its ownership—its lawful ownership—of all these properties. No one contends that its title to all these properties is defective or that any one can recover from that company these properties. No one contends that there is any Federal law which directly authorizes the forfeiture or the destruction of any of these properties. Yet the decree in this case, to a large extent, does injure and destroy them.

This decree because, *and only because,* these stockholders conveyed to the Standard Oil Company of New Jersey their properties theretofore jointly held and used for the production, transportation and sale of oils, and because that Standard Oil Company took and used and operated the properties exactly as they had been operated and were being operated at the time of the transfer, found that these acts constituted a violation of the Sherman Act; and in Section Seven the decree actually prohibited all the appellants from engaging in interstate trade until the discontinuance of that illegal combination.

Discontinue the operation of the combination; that is, cease to operate all our properties as one whole, and under the decree, segregate them into independent, separate units.

And how does the court say we may so discontinue?

Section Five of the decree says, by distributing ratably to the stockholders of the Standard Oil Company the shares to which they are equitably entitled in the defendant corporations in the combine.

Such a distribution would, as in other cases heretofore decided by this court, restore the *status quo,*—put the stockholders where they were when and before they conveyed to the Standard Oil Company of New Jersey,—and this would have followed the decree approved by this court in the Northern Securities case.

Harriman vs. Northern Securities Co., 197 U. S. 289, 290.

The court below, however, added to the Northern Securities decree two sections; viz., Six and Seven (6 and 7) in the case at bar, and by Section Six controls the properties and the stockholders after the actual distribution allowed by Section Five; and by Section Seven absolutely prohibits the appellants from engaging in any interstate trade until the indefinite period of the discontinuance of the illegal combination. Section Seven absolutely prohibits all the appellants from engaging at all in interstate trade—interstate trade not only in oils, but in everything else.

ILLUSTRATION OF THE EFFECT OF THE DECREE.

We suppose the distribution made, and a stockholder in the Standard Oil Company, John Doe, as all others, re-

ceives his fractional interest in all the different properties which that company owns. But he only receives such fractional interest under the decree in certain ways and forms.

In the Northern Securities case it was left to the stockholder to determine the method of distribution. When once the stock was distributed, the stockholder was not restricted in its use or disposition, and in that case the court did not hold on to properties in which the stockholder had an interest.

But in our case, supposing John Doe has already received his fractional interest, what may he do with it?

If he only owns from one to five shares of the stock, as we hereafter demonstrate, he has under this decree merely a fractional share in each of the other properties, which will be of small value.

He may not use that fractional share except in accordance with the terms of Section Six.

He may not join his co-owners in the sale of any of the properties *potentially competing* to any party to the bill, and he may not likewise buy from the other parties.

Under the decree each unit is to stand alone, freed and disunited from all other units, and without the power to make a contract, express or implied, in reference to the oil business, for fear that under Section Six it may tend to a restriction of commerce or a monopoly, and thus subject the party to an attachment for contempt.

Section 6 of the decree says that, though this distribution to John Doe has been made, yet all these companies are still under control of the court and are

"enjoined and prohibited,"

from

(1) carrying on the combination;

or

(2) from entering into any *like* combination, the effect of which will be to restrain commerce in petroleum;

or

(3) from prolonging the monopoly now possessed by defendants;

either

by the use of liquidating certificates or other written evidences of a stock interest in two or more *potentially* competitive parties to the illegal combination,

or

by a conveyance of the physical property and business of any one or more of the defendants to a *potentially* competitive party to this combination,

or

by causing the conveyance of the property and business of two or more of the *potentially* competitive parties to this combination to any party thereto,

or

by placing control of any of said corporations in a trustee

or

by causing its stock or property to be held by others than its equitable owners

or

by any similar device,

or

(4) from making any express or implied agreement or arrangement together or one with another like that adjudged illegal hereby relating to

(a) the control or management of any of said corporations,

or

(b) the price or terms of purchase,

or

(c) of sale,

or

(d) the rates of transportation of petroleum or its products,

or

(e) relative to the quantities thereof purchased, sold, transported or manufactured by any of said corporations

which

(f) will have a *like effect* in restraint of commerce among the states in the territories and with foreign nations

to

(g) that of the combination, the operation of which is hereby enjoined.

So here the stockholder has his fractional interest, but each company is so tied up that no man can tell in advance, and until after the decision of the Court, what any one or two of the companies may do.

Judge Hook in explaining the decree, said the purpose of it was:

> "* * * that each corporate member of the combination engaging in inter-state or foreign commerce shall in the future have and exercise corporate independence with its own particular set of stockholders not united with or tied to those of its competitors, actual or potential, under a single or common control." (Record A, p. 587).

But the court seems to overlook that:
Each one of these corporations would be owned by identically the same stockholders, each stockholder owning the same proportion of stock in each corporation. Take the fifteen refineries: Each refinery is owned by identically the same persons in the same proportion; yet the court's decree is that the refineries are not to be run —

"under a single or *common* control;"

and are not to have the relations to each other detailed in the decree just cited.

How can these same owners differentiate each refinery, give it a separate and independent control, and have it run differently from the other refineries, when they are the joint owners of all of them?

Of necessity, each refinery will have a *common* control and unless it can have this, it cannot be run.

But this section further says that John Doe cannot, if he wishes, get a joint certificate of ownership in two or more

"*potentially* competitive parties."

No one of these corporations can sell its property or business to

"a *potentially* competitive party."

No one of the individual defendants may buy the property or business of any one or more

"*potentially* competitive parties."

If John Doe and his co-owners wish to sell the physical properties, which certainly never did compete, to any other stockholders, this, Judge Hook says (Rec. A, p. 588),

"* * * *would violate the decree.*"

It repeatedly in speaking of a person (party) designates him as (Section 6)

"*potentially* competitive party"

"potentially competitive parties"

without otherwise designating him.

It does not earmark the unit nor designate how one shall determine who are and who are not

"potentially competitive parties."

No one of the corporations can be placed in the hands of a trustee or its stock be held

"by others than its equitable owners"

or

"by any similar device."

Nor can any of the corporations make either

"express or implied agreement or arrangement"

"*like* that adjudged illegal hereby relative to"

the control or management of any corporation or price or terms of purchase or sale or rates of transportation of oil or the quantities thereof purchased, sold or transported or manufactured which will have a like effect as that of the present combination.

It enjoins generally either express or implied agreements as to the trade.

Thus, all the acts of these co-owners of all these plants are overshadowed with the danger that from their future acts some judge may infer a prohibited *implied* agreement and punishment for contempt may be inflicted.

Who would run a business so fraught with danger?

Does not this even of itself prevent these co-owners from operating their plants?

Though it does add a qualification "which will have a like effect" as the present combination, it does nothing to indicate how one can determine that and tell what would and what would not have a like effect, and without limitation of time, compels the individual to transact business under intolerable conditions.

See *Swift & Co. vs. United States,* 196 U. S., 375, where this court struck out of the decree the words—

"* * * or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid. * * *"

Mr. Justice Holmes, in the opinion of the court said:

"* * * we equally are bound by the first principles of justice not to sanction a decree so vague as to

put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can. (p. 396.)

"* * * The general words of the injunction 'or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid,' should be stricken out. The defendants ought to be informed as accurately as the case permits what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid. To the same end of definiteness so far as attainable, the words 'as charged in the bill', should be inserted. * * * (p. 401.)

"So modified it restrains such combinations only to the extent of *certain specified devices,* which the defendants are alleged to have used and intend to continue to use." (402).

Substantially the only difference in this respect between the Swift decree and the Standard decree is that the latter substitutes the word "similar" or "like" for the word "other."

As the evident purpose of the decree is to compel competition where none ever before existed, and if, as the opinion and decree seem to decide, each one of these companies, and each individual, shall be competitor of all the others, the result will be baffling.

Some of the situations arising under the decree—

(a) Here are, say, twenty refining companies each actually helping in producing refined oil. What alliance, if any, may each one of these twenty have either with one or more of the other refineries, or one or more of the pipe lines, or one or more of the tank reservoirs, or one or more of the producing oil wells?

(b) Here are eleven pipe line companies carrying oil. What contracts may any refinery or oil well or reservoir have with any one or more of them?

(c) What contract relations may each individual have with any one or more of the refineries—pipe lines—tanks—reservoirs?

And yet each corporation and individual must do business under threat of imprisonment of its managers if a move or a contract or sale or purchase be made which a judge may think restricts commerce or tends to monopoly.

THE DECREE HAMPERS AND GREATLY INJURES THE VALUE OF THE STOCK OF THE STOCKHOLDERS, THOUGH THEY ARE NOT PARTIES TO THE BILL.

The decree seeks to and does, under Section 6, follow and control the use of the stocks of the individual stockholders in their hands in the sub-companies, and hampers and restricts such stockholders in the use they shall make of them.

No *one* of the stockholders of the Standard Oil Company seems able to do aught with the shares of stock the Standard Oil Company will transfer to him except to hold them or sell them to an outsider.

No one of these individual persons is a party to this Bill. They have never been heard or had an opportunity of being heard on the justice of such conclusion.

Corporations parties to a bill in equity do represent their stockholders, but only within the scope of corporate power, and not as to the individual rights of the stockholder to do with his property as he chooses.

Taylor & Company vs. Southern Pacific Company, 122 Fed., 147, 153, 154:

A stockholder of the Southern Pacific Company filed a bill against that company and the Union Pacific Railroad Company to enjoin the voting of stock owned by the latter. The complaint made was that the Union Pacific was planning to elect its own directors to the Board of the Southern Pacific and thereby to dominate the management of a competing railroad company. Service was not obtained on the Union Pacific Company.

Circuit Judge Lurton held that the Union Pacific Company did not represent its stockholders in questions as to their rights to vote their shares, and that, therefore, no relief could be granted, without proper service being made upon the Union Pacific Company.

He said:

"The second ground for maintaining that the Union Pacific Railroad Company is a party by representation

is based upon the very obvious rule that the corporation represents its stockholders in the defense of all suits which involve corporate rights or functions. *But this principle only applies where the matter litigated is a corporate matter, as distinct from a right which pertains only to one in his character as the owner and holder of particular shares.* What right has the Southern Pacific Company to conclude or affect the right of any shareholder in respect of the ownership or incidents of his particular shares?"

Brown vs. Pacific Mail Steamship Co., Fed. Cas. No. 2,025, 5 Blatch., 525;
Morse vs. Bay State Gas Co., 91 Fed., 944, 946;
Harriman vs. Northern Securities Co., 197 U. S., 244, 288-290.

Decree follows the appellants and their properties after the dissolution.

Under constant threat of proceedings for contempt in the violation of such a broad, comprehensive, and yet vaguely worded decree (Section 6) that no one could in advance certainly foretell whether any given act was a violation—how could business be carried on?

The decree seeks to cover and does cover the future business operation of the appellants in petroleum, and now

adjudges, but in a vague and indefinite way, in advance of the facts and the exact situation in the future, what things may or may not then be done.

Judge Hook, explaining the decree (Rec. A, p. 587), said:

> "A holding company owning the stocks of other concerns whose commercial activities if free and independent of a common control would naturally bring them into competition with each other, is a form of trust or combination prohibited by section 1 of the Sherman Anti-trust Act. The Standard Oil Company of New Jersey is such a holding company. The defendants who are in the combination are enjoined from continuing it and from forming another like it. The holding company is enjoined from exercising the rights of a stockholder in the subordinate companies and they are enjoined from allowing it to do so or to benefit therefrom in the way of dividends. A means of dissolving the present form of combination is left open to-wit: the distribution among the stockholders of the holding company of the stocks it owns in the subordinate companies to the end that each corporate member of the combination engaging in interstate or foreign commerce shall in the future have and exercise corporate independence with its own particular set of stockholders not united with or tied to those of its competitors, actual or potential, under a single or common control.
>
> * * * It is thought that with the end of the combination the monopoly will naturally disappear; but, lest, instead of resulting that way, the monopoly so wrongfully gained be perpetuated by the aggregation of the physical properties and instrumentalities by which it is maintained in the hands of a member of the

combination and the liquidation and retirement from business of the other members, it is held that such a course would violate the decree."

In the *Northern Securities Case,* as stated in *Harriman vs. Northern Securities Co.* (197 U. S., 289), the court merely:

"* * * enjoined the doing of certain threatened acts;"

and it

"contented itself"

with that order.

If controversies arose in the future that

"* * * would be a controversy that would properly form the subject-matter of an independent suit between the parties immediately interested." (*Ibid,* p. 290)

This court approved of such decree.

The Sherman Act closely limits and defines the power of the court on a petition filed to give equitable relief.

The petition must pray

"that such violations shall be enjoined or otherwise prohibited."

It is these VIOLATIONS of the Act that the court may enjoin, and only such *violations.*

But the court below enjoined all the defendants from

"engaging or continuing in commerce among the states"

until a certain event.

This portion of the decree is clearly not within the words of the Sherman Act.

Assume for argument's sake that the Standard Oil combination of 1899 is illegal (which we deny), yet the appellants may in the future, as part of their constitutional rights, engage in interstate commerce by themselves singly or jointly or with others. The Sherman Act does not impose the penalty that if one once violate the Act, he forever or for a time loses his right to engage in interstate commerce.

Where, then, does the court below find its authority to authorize it to enter such a decree, especially when that court recognized the doctrine of this court?

> "Past unlawful competition does not deprive parties of their right to conduct lawful competition."
> *New Haven R. R. case,* 200 U. S. 361, 404.

Undoubtedly a court in equity may and must shape its decree to suit the pending case, and hundreds of cases may be cited to so prove; but each of such decrees was suitable to the facts and the law as it then existed. When Congress sees fit to pass a new statute creating a new offense which it designates as a crime and gives a new and limited jurisdiction to the Chancellor, and the Act itself defines the power of the court, is it not plain that the Chancellor is restricted in such cases to such named powers? As the Sherman Act says, the power of the court is to prohibit and enjoin "*violations of this act.*"

Does not that define the court's power? The Act does not say:

"You can appoint a receiver for a trust," or

"You can fine it or put in jail the guilty members."

As the Act does not so say, is it possible the court can exercise such powers—merely because they would prove effective?

The very purpose of the Act was to make inter-state trade free, open, and encourage every one to enter it. But this decree prevents seven (7) citizens of the United States and their associates from so entering until some other thing done in the past has been effectively repented for, and works meet for such repentance have been performed.

Nature of Our Organization.

Our case has no analogy in decided cases. *The Joint Traffic, the Trans-Missouri, the Addyston Pipe case, the Northern Securities case* were all cases where a number of *independent, unconnected* competing corporations by contract or through stock ownership sought to make freight rates or fix prices or regulate sales or production between pre-existing independent competitors. Strike down the contract or combination and each corporation thereby assumed the relation which it had before the contract.

But in our case seven individuals, assisted by others, buy a portion of their properties, but build a much greater portion. They do all of this out of their joint funds and by their joint enterprise. No one of their properties does compete with any other. All are jointly held and used and controlled as one property. There is no contract to fix prices or regulate production—or regulate rates for freight. The de-

cree, if carried into effect, will not, as in the *Addyston Pipe case* and others, simply leave scores of old corporations where it found them, but will recreate new bodies, now parts of one whole, and now so used as to facilitate and carry out one united business, and will in large degree actually ruin much property.

THE SHERMAN ACT DOES NOT GIVE POWER TO THE COURTS TO STRIKE DOWN AND DISINTEGRATE A NON-COMPETING GROUP OF PHYSICAL PROPERTIES USED TO MANUFACTURE AN ARTICLE OF TRADE. THESE PHYSICAL PROPERTIES ARE BOUGHT AND HELD AND USED UNDER STATE LAWS. THEY DO NOT ENTER INTO INTERSTATE COMMERCE AND HENCE ARE NOT UNDER FEDERAL CONTROL.

If the facts show that the existing organization can legally continue without violating the Sherman Act, the court cannot destroy it, but can only prevent it from doing unlawful acts in the future. For example, seven (7) men by grouping 100 parcels of property, pipe lines, refineries, ships, etc., into one non-competitive group, own the group and may lawfully own it, but they may not use the group for unlawful purposes. *Assume* that the Court found that they had unlawfully used the product of the group and had thereby violated the Sherman Act, and that the court may enjoin further violation. The court may not for such violation destroy the *legitimate* business or property of the group, or forbid its legitimate use in the future. These refineries were used to make oils. Even if the then owners and the

present owners unlawfully used those oils in interstate trade, the Sherman Act does not authorize a decree forbidding the future use of the refineries. Because a man once violates a law—the Sherman Act,—he cannot be driven out of interstate trade. And suppose the owners did not thereafter use the group to make a product, but held it for sale for future rise in price; evidently the fact of the existence of that group does not *per se* violate the Sherman Act—because it takes no part in inter-state commerce. Evidently, then, it is the *use* of the group that creates that which goes into inter-state commerce, and not the ownership of it. But the handling of the group's product in inter-state commerce may be legitimate or it may be illegitimate. The mere putting of the product itself openly and fairly in the market—putting it up as it were at auction, and selling it to the highest bidder in inter-state commerce—would not violate the Sherman Act. Therefore the group itself and the legitimate use of its product do not violate the Sherman Act. But if the owners of the group make a contract in restraint of trade or commerce between the states, *then* that contract is a violation of the Sherman Act, and its continuance will be restrained. But the physical properties will not be destroyed because of a prior improper use of a product which they made.

So also, if the owners of the group, by unlawful means, exclude others from the inter-state trade in oils, such exclusion is a violation of the Sherman Act, and will be restrained. But the physical properties will not be destroyed.

Then, too, such a decree would destroy the legitimate use of property acquired and held under state laws. The Federal Courts may, under the Sherman Act, prevent the unlawful monopolization of inter-state trade, *but because* in the past the owners of a group have used its product unlawfully in such trade, such unlawful past act does not brand

them as outlaws and prevent their lawfully engaging in trade in the future. And because the physical properties were once used to make oils, which oils were illegally used under Federal laws in such trade, it does not prevent the owners of the property in the future from lawfully making other oils under the laws of the state.

For Example:

The appellants may lawfully produce oil, run it to their refineries and refine it. So far under the *Knight case* and *Kidd vs. Pearson* they are acting under state laws and not under federal control. Now, because the appellants had heretofore used the groups of properties they own to produce refined oil, which product appellants after its production used in such an unlawful manner as to violate the Sherman Act, *such* unlawful use of the product in the past did not brand the refineries and other properties as unlawful properties whose future product would always be illegally used. The product itself has been and will be harmless and lawful. Its improper use and the unlawful conduct of the appellants in the past may have subjected the past product in inter-state transit to seizure under Section 6 of the Sherman Act and the appellants to punishment, but certainly it does not brand the group of properties as illegal; or prevent their future legitimate joint use in making refined oil for lawful inter-state traffic. To prevent such use is to practically destroy the property.

If the owners of the organized group, by contract to restrain commerce through restricting competition in inter-state trade in oils, or by unlawful acts, exclude others from

that interstate trade, the continuance of such acts should be restrained, but the physical properties should not be destroyed.

This Court so ruled in the case of the *New Haven R. R. Co. vs. Inter-state Commerce Commission*, 200 U. S., 361, 404, quoted at length *supra*, p. 95.

> "The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. *In other words, the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. * * * To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen.*"

State vs. Omaha Elevator Co., 75 Neb., 637 (1906):

In holding that the anti-trust act of Nebraska did not authorize a decree dissolving a corporation alleged to be a combination in violation of its provisions, the Supreme Court said:

> "The authorities generally hold that equity has no jurisdiction to dissolve and put an end to corporations unless expressly authorized to do so by statute."

Continuance at the time of filing the Bill is a condition precedent to the exercise of the Chancellor's power as to an act which began before the Bill was filed. If that act has ceased, an injunction would be useless.

It is also plain that, as under the Bill and the Sherman Act equity jurisdiction is given merely to restrain violations of the act then taking place or about to begin, it is immaterial whether the organized group was formed in any part by acts which would have been violations of the Sherman Act if such Sherman Act had been in existence at the time of the formation. The Federal Court is acting under a Federal Statute to restrain a continuing Federal crime. The acts which the Federal Courts may restrain are present continuing violations of the Sherman Act—not past violations of any supposed Federal common law. As the Sherman Act was not passed until 1890, acts prior to that date would not be violations of the Sherman Act, and even if the Act was retroactive (which it is not), and ran back to 1870, acts done between 1870 and 1890 could not now in 1910 be restrained under the Sherman Act. For these and other reasons it is useless to consider what the acts were prior to 1890, for they can throw no light on the present controversy. These alleged acts of railroad rebates, alleged unlawful exclusion of others (which we deny), were ended long prior to 1906 when this bill was filed. They were not then actually taking place. They were ended.

Evidently the Court below so thought, for as we have seen, it declined to find that these acts complained of prior to 1890 were true or material, and though it did find a

conspiracy, this conspiracy, the Court said, began, not in 1870, as charged in the petition, but *after* 1890.

State vs. Omaha Elevator Co., 75 Neb., 637:

In a proceeding under the Anti-trust Act of Nebraska, the court denied the right of the state to an injunction based on past acts, saying:

> "The state was entitled to an injunction only on the theory that the defendants were guilty of the acts charged *at the time of the bringing of the suit*: for it did not seek to enjoin the defendants from doing *something that had already been done*" (665).

In *United States vs. Jellico Mountain Coal & Coke Co.*, 46 Fed., 432, 437, the court held the members of a coal exchange to be a combination in violation of the Sherman Act. The combination was still continuing, but some of the defendants had ceased to be members prior to the filing of the petition under Section 4 of the Act.

The direction for the decree was:

> "The petition will be dismissed as to such of the defendants as are not or were not, members of the exchange *at the time of the filing of the petition.*"

Let me assume (for argument's sake merely) that the Trust Agreement of 1882 was illegal at common law; that the present Standard Oil Company organization was by illegal acts prior to 1890 enabled to increase its size; that the same Standard Oil organization thus formed was in existence when the present bill was filed.

Would this authorize the Chancellor, by his decree, to strike down the present organization without any proof that any illegal act had been done by the combination *after* the Sherman Act was passed; that such act was, when the present bill was filed, **actually happening?**

The answer is plainly, No.

This bill is under the Sherman Act.

The court's jurisdiction is solely under that Act.

Congress might possibly have broadened that Act to include all kinds of illegal trade combinations, and have broadened the powers of the court as to the relief granted—but it did not do so. It provided only for relief against the

"violations of this Act;"

and the things which are denounced by the act are only two:

(1) Contracts or combinations in restraint of trade;

(2) Attempts to monopolize by illegal means.

And the relief which the act gives is

"to prevent and restrain such violations,"

and

"that such violation shall be enjoined or otherwise prohibited."

Aside from the ownership and use by the Standard Oil Company of the joint properties in 1906, is there a particle of proof that there then existed and was being carried out any contract in restraint of trade? If so, what is it? On what page is the proof given?

In 1906, is there a particle of proof that by illegal means the present organization was *then* excluding any one from the inter-state trade? Please refer us to the page proving it. What illegal act was the Standard Oil Company guilty of in 1906?

If the reply be that the original organization formed prior to 1882 still continued, and this was in part enlarged by means illegal at common law, and the organization itself was also illegal at common law—and *therefore* the Sherman Act is violated—I answer:

But under the Sherman Act only *continued*
"violations of the Act"
set out in the Bill filed, give a court of equity jurisdiction, and these facts must show an existing continuing contract in restraint of trade or a present existing effort by illegal means to gain a monopoly of it.

As Judge Gray said (*ante* p. 83), the only power that the Sherman Act gives the court is—

> "* * * 'to prevent and restrain' the future or continuing violation of the act. * * * There can be no injunctive relief granted, unless it tends to restrain some specific future or continuing violation of the Act."

Illegal acts which were done prior to 1906 and which were ended prior to 1906, cannot be in 1906 continuing violations of the Act. The aggregation of properties is not of itself a violation of the Sherman Act if they are merely for private trading purposes. This may or may not be a violation of state laws,

but the Sherman Act only concerns interstate commerce, and it is only the product made on or in or by reason of the properties that goes into inter-state commerce. Now this product as it enters inter-state commerce may do so lawfully or unlawfully, but the mere fact that the men who made it had illegally or improperly acquired the properties in which it was made, does not *of itself* prove that in the bargaining, sale or transportation of the product in inter-state commerce, there necessarily was either a contract in restraint of trade or an attempt to monopolize. The mere existence of the aggregation does not prove a violation of the Sherman Act. There must be something more.

And so it was ruled in the Calumet & Hecla case—cited *infra*, pages 128-129.

If it be true that the mere aggregation of properties was void at common law (which I deny) then I reply:

But the Sherman Act does not so provide. It does not make the mere organization of properties a violation of the Act, and if it did so provide, as such an organization was not of itself interstate commerce, and only *after* its products went into interstate commerce the commerce clause would attach, its constitutionality would be doubtful.

United States vs. E. C. Knight Co., 156 U. S., 1.

The Sherman Act recognizes as proper methods of holding properties and carrying on business, persons, combinations, corporations, and trusts and partnerships and joint ownership.

If it be said, however, that the real question in this case is the existence of the *power* to restrain trade and monopolize it and not its actual exercise, and that the Securities case so ruled, the answer is:

(I) Quasi-public corporations owing duties to the public may not unite and gain power but private traders may.

(II) The Securities case involved two parallel and competing railroads, which could *not* unite. It was unlawful for them to so unite. Therefore, the placing the control of the two in possession of one person was practically to unite the two and thus violate the law.

Whereas it is lawful to purchase and group properties for private trading purposes, and one competitor may purchase the property of another. It is lawful to gain the *power* to restrain trade and monopolize trade if it is the result of lawful competition.

(III) Interstate commerce is not concerned with the real estate which does not enter into interstate trade. It is concerned solely with the product of it. The fact that the ownership of the group was illegally acquired does not of itself prove that the owners of it *have* or will exercise the power to restrain inter-state trade in oil or monopolize the same.

Calumet & Hecla Mining cases (167 Fed., 704; 167 *Ibid,* 721—overruling 155 *Ibid,* 869): There the Calumet Company obtained control of the Osceola Company. Considering the lawfulness of the power to control divers private trading corporations engaged in the same business, the Circuit Court said, after reviewing the Supreme Court cases:

> "* * * I find nothing in them sustaining the proposition that the direct, immediate and necessary effect of a control by a corporation over a competitor, through stock ownership, is to restrain trade or create a monopoly either in manufacturing or selling. * * * Beyond such indirect restraint as is incidental to a common management, it is difficult to see that competition will be necessarily unlawfully restricted. It is true that an opportunity for restricting competition is afforded by the relation; but this is equally true of every case of a common general management. * * * In either of the cases presented, 'further acts in addition to the mere forces of nature are required to bring about the restraint of competition beyond such restraint as indirectly, remotely and incidentally results from the relation of a common management * * * * the authorities do not go to the extent of holding that in the absence of intent, or of special features or conditions, every case of control by a manufacturing or mining corporation over a competitor, through stock ownership and consequent direction of corporate management, creates, *per se,* directly, immediately and necessarily, a restraint upon trade; and I am not prepared to hold that such is its effect."

The Circuit Court of Appeals, 167 Fed., 728, affirmed this view, Judge Lurton delivering the opinion.

> "But when the agreement or combination in question does not in its terms provide for the suppression of

competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an unlawful result, some evidence of an unlawful intent becomes essential, that the courts may see that if not stopped, a prohibited restraint is likely to be created. * * * The power of stock control which the Calumet Company has acquired may be exercised only in a legitimate and lawful way in the interests of an economical management of both companies. In that case it has done nothing directly affecting commerce among the states."

That the mere existence of the power to restrain trade by a grouping of private trading plants does not of itself constitute a violation of the Sherman Act, the Court below admitted. Judge Sanborn said:

"* * * monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law and may not be forbidden by the courts." (Rec. A., p. 585).

Judge Hook:

"To offend the act the monopoly must have been secured by methods contrary to the public policy, as expressed in the statutes or in the common law. * * * Congress did not intend to impede legitimate commercial activity nor put a limit to its fruits." (Rec. A, p. 589).

If the argument is, however, that the original combination of the seven (7) was to gain a monopoly, and such an organization so combining and intending still continues and did exist in 1906, and this constitutes a violation of the Sherman Act, I answer:

The Sherman Act expressly recognizes the existence and lawful operation in inter-state trade of combinations, trusts and corporations, and it is only when such combinations attempt to restrict trade that the Act denounces them—only when by *unlawful means* they attempt to monopolize, that they violate the Act.

If by competition lawfully carried on the combination or trust gains, say, two-thirds of the trade, and thus does to that extent monopolize and restrict competition, such act is lawful.

Neither at common law nor under the Sherman Act, was it unlawful for men to associate in private trading business and seek by lawful means to monopolize part of any trade.

As the court below in this case said (Rec. A, p. 585):

"* * * and its true construction is that while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoinable under it, monopolies of part of interstate and international commerce by legiti-

mate competition, however successful, are not denounced by the law and may not be forbidden by the courts."

Whitwell vs. Tobacco Co., 125 Fed., 454.

If it is said that this position allows the combination to keep and use property which it got by *unlawful means,* the reply is, NO.

It only means that under this form of procedure and under the Sherman Act, that question is not before the Court.

This Court cannot under the Sherman Act inquire into and determine how under State laws appellants procured their physical properties, and if it thinks they did so improperly, punish them for so doing.

There are adequate methods to punish such acts by state laws, but an equitable proceeding under the Sherman Act is not one of them.

All the Court decides is that Congress in its wisdom has not deemed it proper to give any other equitable relief than enjoining the *continuance* of the unlawful restraint of trade or the monopoly of the same.

The Court concedes (Rec. A-583) that its decree under the Sherman Act should be restricted to injunctions to prevent present continuing and future threatened violations of the same. And it then enumerates the present continuing violations as follows:

> "This court is not authorized to punish past violations of this law in this suit; its power is 'to prevent and restrain violations of this act' and the defendants insist that the United States is entitled to no relief because it has failed to prove that they are now violating or that when the bill was filed they were violating this law. But the power to vote the stock, to elect the officers of the subsidiary corporations, to control and operate them and thereby to restrict their competition in interstate and international commerce was illegally granted to the Standard Oil Company of New Jersey in 1899, and that company ever since has exercised unlawfully and is still so using that authority, the seven individual defendants are dominating and directing its exercise of this power, the subsidiary corporations are knowingly submitting to and assisting that exercise and all of them are participating in the fruits of it. These are menacing and continuing violations of the act which the Congress has imposed the duty upon the courts to restrain and prevent."

Yet **the court went away beyond these alleged violations and by Sections 6 and 7 of the decree controls the activities of all the individuals and properties for an indefinite period in the future.**

Ruinous Effect of the Decree.

The seven (7) individual defendants and

Thirty-eight (38) corporate defendants are named in Section 2 of the decree as having formed a combination in restraint of inter-state trade. The corporations include eleven pipe line companies—fifteen refining companies—seven marketing companies—four producing companies, and one tank car company.

The decree, carried out, compels:

(1) Each one of these companies to stand singly and alone and without any relation to another;

(2) Each one to compete with all the others;

(3) Each to refrain from either expressly or impliedly having any contract relation with each other in reference to

(a) The control or management of any of said corporations;

(b) Or the price or terms of purchase or of sale, or the rates of transportation of petroleum or its products in interstate commerce;

(c) Or the quantity thereof purchased, sold or transported or manufactured by any of them;

(d) And then adds
"which will have a like effect in restraint of commerce."

The effect of this decree is to take away from the individual defendants and from the Standard Oil Company of New Jersey any and all joint control over the different sub-companies, and to prevent them from exercising that control in any way whatsoever in the future, either by creating a new corporation or by agreeing or contracting together with one another in any way whatsoever with respect to such control.

In other words, the effect is to compel the different sub-companies named in the bill to stand alone, to act independently from all and each of the others, to compete with one another, and yet every one of such units will be owned by the same individuals and in the same proportions.

The inherent vice of this decree is that it seeks to create an artificial division which never existed before; it does not seek to compel members who were formerly independent to resume that independence, but it seeks to compel different sub-companies, which have never been independent, which have never been more than mere agencies created for certain purposes, to sever their allegiance to their principal, and to stand apart, independent and hostile to that principal and to each other.

In the cases heretofore where an injunction has been granted, the purpose of the injunction has always been *restorative;* the decree has always aimed to put things back into the place they occupied before, and under like conditions as before, the contract or combination distorted affairs and

disturbed the course of inter-state trade; thus where A, B and C are each the owner of an independent competing business, an injunction will restrain them from combining together to control prices or to divide up the territory between them or to in any way destroy competition, when this would affect the inter-state trade, and an injunction restraining the combination merely puts them back where they were before, as separate independent competitors.

But the relief granted in the case at bar is wholly different from that. This is a case where seven individuals and their associates have been engaged in a common business, acting together for thirty-four years, with common interests, with common aims, and now having a great business built up by common effort, divided for convenience in operation into *numerous separate departments or agencies,* and practically all built by their own hands, acting not separately, but jointly. Now comes this decree which seeks to *split up this business into as many independent parts as the owners have seen fit, to divide it into departments or agencies,* and to compel each of these departments or agencies to stand alone. The effect is not that men who have been operating independently heretofore shall continue to remain independent, *but that seven men and their associates who have been, as it were, in partnership for thirty-four years, shall dissolve that partnership;* not that competition shall be restored to its former condition, *but that a competition which never existed shall be created; in other words,* it is not sought to restore an old, but to create an entirely new status and new competition.

To cite some concrete examples of the things sought to be attained by the proceeding in this case:

(a) The seven individual appellants and their associates now own 54,616 miles of pipe line, and for ease of management have divided the whole into eleven different parts, putting each part under the control of a separate corporation, these all being named in Section 2 of the decree, as follows: Buckeye Pipe Line Company, Crescent Pipe Line Company, Cumberland Pipe Line Company, Eureka Pipe Line, Indiana Pipe Line Company, National Transit Company, New York Transit Company, Northern Pipe Line Company, Prairie Oil & Gas Company, Southern Pipe Line Company, Southwest Pennsylvania Pipe Line Company.

These companies jointly own 54,616 miles of pipe lines, of which the seven individual defendants and their associates built over 50,000 miles.

In these pipe lines the seven individuals and their associates have an investment of over $61,000,000.00.

All of these different lines are joined together into one compact, connected system and operated as a whole. With the insignificant exceptions already noted in another place, no one except the seven individuals and their associates was ever in any way interested in any of these pipe lines; the owners who built them divided up this complicated system

into eleven different divisions and gave the control of each of these divisions to an *agency* created by themselves for the purpose of local supervision and control; *these agencies comprise the twelve pipe-line sub-companies. These local sub-companies never were independent, never did compete, never were anything but the agents of the seven individuals and their associates, the product of those individuals' joint creative labor.*

This decree splits up this pipe line system into eleven different parts, takes away from the owners, *who jointly built the pipe lines and who created the sub-companies,* all control over the different sub-companies, and compels the eleven different parts to stand alone, independently of their principal and of each other, to be hostile to and to compete with their principal and with one another.

Then, too,

Pipe lines are never parallel but always continuous, and each line has a value which depends wholly upon its connection with other parts of the system, and whether all are used together as one whole. The carrying out of the decree would cut the pipe line system into isolated segments, prevent such use, and make the successful operation of the pipe lines impossible.

(b) The seven individuals and their associates working jointly, have dotted the world with selling stations, costing from $1,000 to $20,000 each and upwards. In 1882 they had 130, most of which they built, some of which they bought; in 1908 they had 3,242, almost every one of which they built with their own means.

They put these selling stations chiefly under the control of five marketing companies—the Standard Oil Company of New York, the Standard Oil Company of California, the Standard Oil Company of Kentucky, the Standard Oil Company of Indiana, and the Continental Oil Company.

Now by this decree, these companies must stand alone, *which they never did before,* must compete in the marketing business, *which they never did before, must* be hostile to their principal and to each other.

(c) The seven individuals and their associates operate at the present time about eighteen (18) refineries. John D. Rockefeller, Samuel Andrews and William Rockefeller originally built the one now operated in Cleveland about 1865; this refinery, immensely enlarged and very greatly improved, is now under the control of the Standard Oil Company of Ohio; the Solar Refining Company was created by the seven individual appellants and their associates in 1885, who constructed the refinery at Lima; the Standard Oil Company of Indiana was created in 1889 and built the great refinery at Whiting and one at Sugar Creek, Missouri; the Standard Oil Company of Kansas was created in 1892 and constructed the refinery at Neodesha; the seven individuals and their associates also built, through the agency of the Standard Oil Company of California, a great refinery near San Francisco in 1903, and one at Marcus Hook, Pennsylvania, in 1895, through the agency of the Atlantic Refining Company. Of the other refineries which they own, none of them has been purchased since 1882, and all those originally purchased have been vastly enlarged and improved; the one purchased in 1882 at $84,000.00 now being worth $1,450,000.00.

This decree takes away from the seven individuals and from the Standard Oil Company of New Jersey all control, *all supervision over these different refining companies, even over those which they themselves, working jointly, have absolutely created with their own joint means,* and compels these refineries to stand alone, to be independent, to compete with one another.

(d) To facilitate the shipments of refined oil, gasoline, etc., over the railroads of the United States, the seven individuals and their associates have built over 10,000 tank cars for their own use, and today have them on every railroad on the continent. For the purposes of efficient control and management they put all these tank cars in charge of a sub-agent, the Union Tank Line Company. The company, its property, its business, its capital, are all and absolutely the work of the seven individuals and their associates, and these tank cars are valuable only as they are used with the entire plant, and especially refineries. And now, perforce, this corporation is cut away, must stand alone, cannot be controlled in any sense, manner or form by its founders and owners; must itself, the creature, compete with, fight against its creator.

(e) Along with their other developments, the Standard interests have created a great foreign trade. Every civilized country on earth is dotted with their selling stations. This foreign commerce is of immense volume, being 63% of the illuminating oil produced and of course a large per cent. also of the by-products.

In order to best economize their efforts, they put practically all this foreign trade under the control of one corporation, the Standard Oil Company of New York. That com-

pany owns the ships, the docks, the selling stations in the different countries, with some few exceptions, as in Great Britain where the Anglo-American Oil Company takes care of the selling business. The other companies that export oil do it through the Standard of New York. The chief companies that thus export oil are the Standard Oil Company of New Jersey, the Atlantic Refining Company, Standard Oil Company of California, and the Standard Oil Company of New York.

These different companies are all named in Section Two of the decree, and it is difficult to see how the present arrangement can be continued without violating the sweeping terms of Section Six of that decree. If the Standard of California, the Standard of New Jersey and the Atlantic Refining Company all do their exporting through the Standard of New York, they will certainly not be competing in the foreign trade and this would clearly be such an

"express or implied agreement or arrangement together or one with another,"

as to come within the terms of Section Six of the decree.

This decree means, therefore, that all these different companies must enter the contest for the foreign trade, each fighting with the other. If they are to continue in that trade, each must buy or build ships, each must establish selling stations, each send representatives to the different foreign countries, underbid one another for the trade, each company scheme to supplant the other. Although France, for instance, is already well covered with selling stations by the Standard of New York, yet the other companies (all owned by the same men who own the Standard of New York) must enter that country, establish selling stations, actively compete with the Standard of New York and with each other to the great financial loss of all of them.

As in the instances cited above a competition in foreign trade *is to be created where none ever existed before.*

(f) The decree unlawfully restricts and limits the individual rights of each of the seven defendants by preventing each from purchasing with his individual means such of the properties of the Standard Oil Company of New Jersey as he may desire, and also restrains the stockholders and corporations from selling to one such properties.

It distinctly denies the right of an individual with his own means to buy all such properties.

It distinctly denies the right of each stockholder to sell such properties to one person.

The individual defendants and their associates, by the labor of their own hands, have built up a mighty business, not by combinations of and agreements with competing interests, but almost wholly by construction; they have divided the business for the purposes of local control and government into a number of different departments or agencies. These have each been put under the control of an agent, a sub-company. These latter are the sub-companies named as defendants in the petition.

The decree must stand, if at all, upon one of two propositions:

(1) The Sherman Act forbids men to unite their abilities and their means, through partnerships and the like, for the joint development of an industrial enterprice; it denounces all united action, requires each man to work by himself;

(2) If men *may* work jointly, the Sherman Act requires that each industrial unit which they create must stand separate, apart, free from, hostile to every other

industrial unit which they create. If they, the creators, hold these units jointly, and do not require, or at least permit them to compete with one another, they have formed a combination and a monopoly in violation of law, and may be sent to jail for the crime.

THE DECREE WOULD ESPECIALLY, IN A LARGE DEGREE, DESTROY THE VALUE OF THE STOCK OF ALL SHAREHOLDERS WHO EACH HAD FIVE SHARES OR LESS. THE STOCKHOLDERS ON AUGUST 19, 1907, HOLDING FROM ONE TO FOUR SHARES EACH NUMBERED 1,157, AND THE STOCKHOLDERS OWNING FIVE SHARES EACH NUMBERED 439, OUT OF A TOTAL NUMBER OF 5,085 STOCKHOLDERS.

The decree compels the Standard Oil Company of New Jersey to distribute ratably among its stockholders the shares which it owns in the other defendant companies.

The total capital stock of the Standard Oil Company outstanding on August 19, 1907, was 983,383 shares. A stockholder who owned one such share, in the ratable distribution directed by the decree, would receive $\frac{1}{983,383}$ of the number of shares of each company which were held by the New Jersey corporation. For example, the Standard Oil Company owned 49,987 shares of the capital stock of the Anglo-American Oil Company. The holder of one share of the principal company would be given $\frac{1}{983,383}$ of its holdings in the Anglo-American Oil Company, or $\frac{49,987}{983,383}$ of a share. An individual who owned five shares of the parent company would receive five times this fraction, or $\frac{249,935}{983,383}$ of a share; and so on.

The denominator 983,383 is so large that it would be literally impossible to combine the fractional parts so as to form whole shares. The owner of five shares of the New Jersey Company would receive $\frac{249,935}{983,383}$ of a share of the Anglo-American Oil Company. He could not buy the remaining $\frac{733,448}{983,383}$ of a share necessary to combine with it, to form a single share. This latter fraction would not be created in the distribution and would not exist at all. These fractional stocks—representing approximately one-millionth parts of a share—as a practical matter, could not be combined into integral shares by the holders.

Such fractional shares cannot be transferred on the books, and the holder could not attain the status of a stockholder or receive any of its benefits or privileges. He could not vote or participate in the management of the corporation or receive any dividends. The distribution enforced by the decree would entirely destroy the value of the stock in the hands of the small shareholders. The privileges of voting and receiving dividends are the ordinary and necessary legal incidents of ownership of shares of stock, and to annul and forfeit these rights is tantamount to forfeiting the stock itself.

Moreover, the distribution in accordance with the decree, by disenfranchising the small shareholders, would deprive them of any voice in the management and enable the individual defendants and a few other large stockholders to control all of the subsidiary companies.

The hardship thus inflicted upon the small shareholders would not be a rare or exceptional case. On August 19, 1907, the number of stockholders of the Standard Oil Company of New Jersey was 5,085. Of this total, 1,157 owned from one to four shares each. 439 owned 5 shares each. In return for five shares of the Standard Oil Company of New

Jersey, worth in the neighborhood of $3,000 to $3,500, the decree would force upon the stockholders the unmarketable and worthless fractional parts of shares in thirty-two different companies, shown in the schedule. From this schedule it appears that the five-shareholder would receive less than one share in 29 out of the 32 companies named.

The figures in this schedule are compiled from Defendants' Exhibit 1. (Record, Vol. 18, page 1) and Petitioner's Exhibit 1, (Record, Vol. 7, page 3).

SCHEDULE.

On Aug. 19, '07, Stockholders of S. O. Co. (N. J.) owning from 1 to 4 Shares, . .	1157
On Aug. 19, '07, Stockholders of S. O. Co. (N. J.) owning 5 Shares, ...	439
On Aug. 19, '07, Stockholders of S. O. Co. (N. J.) owning not more than 5 Shares, . .	1596

	Total S. O. Co. (N. J.) Holdings Sept. 14, 1907	Shares & Scrip Accruing to 5 Shares S. O. Co. (N. J.) Shares	983,383rds Of One Share
			249,935
Anglo-American Oil Co., Ltd.	49,987		983,383
			249,995
Atlantic Refining Co.	49,999		983,384
			9,985
Borne-Scrymser Co.	1,997		983,383
			16,587
Buckeye Pipe Line Co.	199,994	1	983,383
			13,885
Chesebrough Mfg. Co. Cons'd	2,777		983,383

Colonial Oil Co.	2,493		12,465 983,383
Continental Oil Co.	3,000		15,000 983,383
Crescent Pipe Line Co.	60,000		300,000 983,383
Eureka Pipe Line Co.	49,994		79,970 983,383
Galena Signal Oil Co. Pfd.	14,875		74,375 983,383
–do– Com.	55,920		279,600 983,383
Indiana Pipe Line Co.	19,994		99,970 983,383
National Transit Co.	509,033	2	578,399 983,383
New York Transit Co.	49,999		249,995 983,383
Northern Pipe Line Co.	39,999		199,995 983,383
Ohio Oil Co.	399,994	2	33,204 983,383
Solar Refining Co.	4,994		24,970 983,383
Southern Pipe Line Co.	99,999		499,995 983,383
South Penn Oil Co.	24,999		124,995 983,383
S. W. Penna. Pipe Lines	35,000		175,000 983,383

S. O. Co. (California)	169,995	849,975 983,383
-do- (Indiana)	9,990	49,950 983,383
-do- (Iowa)	10,000	50,000 983,383
-do- (Kansas)	9,993	49,965 983,383
-do- (Kentucky)	9,972	49,860 983,383
-do- (Nebraska)	5,995	29,975 983,383
-do- of New York	149,999	749,995 983,383
-do- (Ohio)	34,994	174,970 983,383
Swan & Finch	1,000	5,000 983,383
Union Tank Line Co.	34,994	174,970 983,383
Vacuum Oil Co.	25,000	125,000 983,383
Washington Oil Co.	7,148	35,740 983,383
Waters Pierce Oil Co.	2,747	13,735 983,383

Yet the Court said in its opinion (Rec. A-585):

"It is a grave and delicate task to determine the exact limits of the relief to which the Government is entitled * * * (The decree) may not prohibit all possible violations of the law and thus put the whole conduct of the defendants' business at the peril of a summons for contempt * * * (The Court's) duty not to deprive the defendants of their right to engage in lawful competition."

We submit that there are no precedents in the books nor logical reason justifying such a confiscatory, such a ruinous decree as entered in this case; that such a decree if carried to its logical conclusion attacks the very foundations of the modern business world.

IV.

THE GOVERNMENT, NOT HAVING APPEALED, CANNOT ASSIGN ERROR TO THE DECREE OF THE COURT BELOW, OR OBJECT TO ITS FINDINGS OF FACT, OR ASK TO HAVE ADDITIONAL FACTS FOUND WHICH THE COURT BELOW DID NOT FIND. IF THE FACTS FOUND ARE NOT SUFFICIENT TO SUPPORT THE DECREE, THE CASE MUST BE REVERSED.

The Government has not excepted to or appealed from the finding of facts in the decree of the Court below, and THEREFORE in a case of this nature where an extraordinary special remedy is given, it is concluded by such finding.

We submit that the Government must stand or fall on that opinion—on the findings of fact in that opinion—and on the decree.

We appealed from it. The Government did not.

We filed exceptions to it. The Government did not.

The Government, we submit, stands and must stand on that opinion and that decree. It cannot now and in this court claim another decree by disregarding that opinion and that decree.

The charges made in the bill were of a conspiracy in 1870, and different unlawful acts were charged prior to 1890. Rebates from railroads were charged; illegal contracts with railroads were alleged; unlawful acts of competition were averred. All these were in pursuance of a conspiracy made, the bill said, in 1870 and continued until 1906.

The Court below found that the conspiracy originated *since* 1890, not in 1870, and followed by the unlawful acts prior to 1890.

Is not this a distinct finding of fact, which, unappealed from by the Government, is conclusive on it? The words of the decree are:

The decree recited that (Section 1) in and prior to the year 1899 there were twenty corporations in various states engaged in commerce in petroleum and its products among the states, and that one of these was the Standard Oil Company of New Jersey;

"that *since the year 1890,* the defendants named in section two of this decree have entered into and are carry-

ing out a combination or conspiracy, in pursuance whereof about the year 1899"

they increased the capital stock of the corporation and conveyed to it the different properties;

"that this combination or conspiracy is a combination or conspiracy in restraint of trade and commerce in petroleum and its products among the several states, in the territories and with foreign nations. * * *"

Section 2:

"That the defendants, John D. Rockefeller, William Rockefeller, Henry H. Rogers, Henry M. Flagler, John D. Archbold, Oliver H. Payne and Charles M. Pratt, hereafter called the seven individual defendants, united with the Standard Oil Company and other defendants to form and effectuate this combination, and since its formation have been and still are engaged in carrying it into effect and continuing it."

Here follow the names of the different corporations, and this portion of the decree giving these names then continues:

"have entered into and become parties to this combination and are either actively operating or aiding in the operation of it; that by means of this combination the defendants named in this section have combined and conspired to monopolize, have monopolized, and are continuing to monopolize a substantial part of the commerce among the states, in the territories and with foreign nations, in violation of section 2 of the anti-trust act."

Is not this a distinct finding of fact which, unappealed from by the Government, is conclusive on it?

We have hereinbefore (pages 27-30) specially considered the Court's opinion on facts, and have called attention to the fact that no finding in that opinion supports the averments of the bill or conflicts with the findings of fact in the decree. In treating of the fact whether the seven did control the group, the Court found they did, but did not find they *conspired* to do any unlawful act prior to 1890. The Court did say they *combined* (not *conspired*) to secure control of competing refineries, but such *combination* was not unlawful if it used lawful means, and the Court did not find that such unlawful means were used or intended.

Webster defines *Combine*:

"To form a union; to agree; to coalesce; to confederate."

He defines *Conspiracy*:

"A combination of men for an evil purpose. An agreement between two or more persons to commit a crime in concert."

If it is now alleged by the Government that there are facts in this case which the Court below should have found, but did not, and which facts the Government now asks this Court to find, the reply is that the Government has not appealed, and under the established practice cannot now be heard to allege error on the part of the Court below.

What the Government asks this Court to do is practically to allow it to assign error.

This proceeding is in Equity, but by a special statutory proceeding wherein the power of the Court is sharply defined. It is a summary proceeding on

"petition setting forth the case."

As soon as the parties are notified

"the Court shall proceed as soon as may be to the hearing and determination of the case."

In such a proceeding, to allow the Government to turn its back on the case as the Court below ruled it, and claim that this Court should take up and consider nearly twenty thousand (20,000) pages of evidence in passing on disputed questions of fact, and that with the necessarily limited time counsel have for argument in the crowded condition of the dockets of this court they should argue and discuss such evidence, is, we submit, unreasonable.

A PARTY CANNOT COMPLAIN OF A FINDING FROM WHICH HE HAS TAKEN NO APPEAL.

McGourkey vs. Toledo & Ohio Railway, 146 U. S., 536, 569:

"* * * as no appeal was taken by the defendant from this decree, of course it is not entitled to complain of this *finding* in this court."

Chittenden et al. vs. Brewster, 2 Wallace, p. 191, 196:

"* * * the rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself, and also, that the party appealing cannot allege error in the de-

cree against the party not appealing. If the appellees desired to avail themselves of this error in the decree, they should have brought a cross appeal. By omitting to do so they admit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing."

Carey vs. Brown, 92 U. S., p. 175;

"The Stephen Morgan," 94 U. S., p. 604.

Mount Pleasant vs. Beckwith, 100 U. S., p. 527:

"Parties who do not appeal from the final decree of the Circuit Court cannot be heard in opposition to the same when the case is regularly brought here by other proper parties. They may be heard in support of the decree and in opposition to every assignment of error, but they cannot be heard to show that the decree below was erroneous."

Loudon vs. Taxing District, 104 U. S., p. 774:

"The city took an appeal from that part of the decree which gave the appellant affirmative relief; but that appeal has been dismissed, * * * for want of prosecution. The case stands here now as though no such appeal had been taken. The city can, therefore, only be heard in support of the decree as it stands. This has long been the settled rule in this court. * * * An appeal brings up for review only that which was decided adversely to the appellant."

Landram vs. Jordan, 203 U. S., p. 62:

"According to the rule that has been laid down in this court, Gabriella, as she did not appeal, cannot go beyond supporting the decree and opposing every assignment of error."

Daniell's Chancery Pleading and Practice, vol. 2, star page 1488:

"But if the application is to discharge an order as not being justified by the evidence which has been used in the Court below, the Court of Appeal looks at that evidence only which is recited in the order as having been read."

At star page 1459, note:

"The distinction between an appeal in Chancery and an appeal to the House of Lords is important, and should be borne in mind; for the effect of the appeal is different, and it is the latter class of appeals which prevails in the United States. An appeal in Chancery * * * is a rehearing, and the Appellate Court has power to deal with the whole case. *Ex parte Kireton Coal Co.,* L. R. 7 Ch., 730. * * * And the Appellate Court may make a decree as upon a trial *de novo.* * * * Upon appeal to the House of Lords, the respondent cannot argue, without a cross-appeal, that the decree below was too favorable for the appellants. *Kellett vs. Kellett,* 3 H. L. Cas., 161; *Yates vs. University College,* L. R., 7 H. L., 438 * * *.

"In the United States, as a general rule, the appellee cannot be heard to assign error."

V.

CASE CONSIDERED DE NOVO. QUESTION.

From pages 4 to 13, *ante*, we have discussed the issue raised by the pleadings, and we may here briefly re-state the issue in the form of a question:

Is it true that when this petition was filed in 1906 the seven appellants and their associates, private traders in oil, were, contrary to the provisions of the Sherman Act, carrying on a conspiracy to restrain inter-state and foreign trade in oil and to gain by illegal means a monopoly thereof?

We have so far endeavored to prove—

(1) That the court below erred in finding that the seven individuals controlled all the appellant companies.

(2) That the decree as entered was not justified or required by the Northern Securities case.

(3) That the mere transfer in 1899 of properties jointly used in private trade to the Standard Oil Company of New Jersey was not a violation of the Sherman Act.

(4) That the decree in form far exceeded the power given to the Court sitting in equity by the Sherman Act.

(5) We have suggested that the government, not having appealed, is bound by the decree as to the questions of fact.

But now

(6) We propose to show, considering the case *de novo*, that it is without merit, that the above questions should be answered in the negative and that the petition should be dismissed.

VI.

IT IS NOT TRUE THAT WHEN THE PETITION IN THIS CASE WAS FILED IN 1906, THE SEVEN INDIVIDUAL APPELLANTS AND THEIR ASSOCIATES, PRIVATE TRADERS IN OIL, WERE, CONTRARY TO THE PROVISIONS OF THE SHERMAN ACT, CARRYING ON A CONSPIRACY TO RESTRAIN INTERSTATE AND FOREIGN TRADE IN OILS, AND TO GAIN BY ILLEGAL MEANS A MONOPOLY THEREOF.

This Brief, in support of the foregoing proposition, discusses and maintains the following:

(1) Each of the seven alleged individual conspirators in this case, as a citizen of the United States, had the right as such citizen to adopt such calling or trade as to him was most conducive to the exercise of his liberty, and to enter, if he desired, into interstate and foreign trade in oils, and having adopted such trade or industry, it became his property just as much as if he had invested his money in a parcel of real estate. Each had the right to follow such trade, associate himself with others, and adopt such means, as the formation of partnerships, trusts and corporations, which the law allowed; and to use all his ingenuity, skill and property to make his business a success. He might lawfully enter and compete for the interstate and foreign traffic, and there is no federal law which limits or attempts to restrict the extent to which he may compete for that interstate and

foreign traffic, or denies his right to associate others with him in partnerships or in corporations or so-called trusts, in such competition.

(2) The federal law allowed and allows each of the individuals to compete freely for the interstate and foreign traffic in oil and its products. He may use all the weapons that his ingenuity and skill can suggest, to wage a successful warfare. His rights to compete are not limited to merely such means as are *fair or reasonable,* but are only limited to such as are *unlawful* and directly tend to the violation of the Sherman Act. No federal law has or does restrict such competition by saying it must not be *"unfair"* or *"undue"* or *"unreasonable,"* but the federal law gives the widest liberty in such strife and limits the means only by forbidding the use of that which is unlawful.

The federal law also allows and assures to each competitor whatever share, however large, of the interstate or foreign trade in oil he or they may win. Provided his means are not unlawful, he may win all he can of such trade, even gain a temporary monopoly and temporarily fix prices. Such monopoly is comparatively harmless if the future trade is left open to competition.

(3) The Sherman Act was passed to protect trade and further competition. The Act does not forbid, but recognizes as lawful, combinations, corporations, and trusts engaged in interstate and foreign trade, and only prohibits them from making contracts directly, substantially and immediately restraining such trade or attempting by unlawful means to monopolize the same.

It makes such restraint and monopoly a crime and inflicts, on conviction, severe penalties for such offense.

It does not limit the quantity of such trade which one or more may gain. It does not forbid the legitimate growth of lawful business, however great that growth may be, nor does it forbid the wealthiest of corporations and men to engage in such trade.

It permits one set of competitors to purchase the property of other competitors solely to avoid further competition. The mere size of the competing corporations or combinations is immaterial.

In addition to the indictment and punishment, and distinct from it, the act allows the courts, on petition of the Government, to restrain, prohibit and prevent the continuance of acts which it forbids and makes crimes.

(4) The alleged monopoly that is complained of in the Petition is not in the ownership of the oil or refineries or pipe lines themselves, nor in the production or refining of oil, but merely in the intangible, shifting, uncertain thing called interstate and foreign trade in oil.

The monopoly of a trade at common law was forbidden because, and only because, it excluded all others from practicing such trade, and seems to have been then limited to a royal grant, as, for example, giving the exclusive right to manufacture playing cards. It was and is a distinct thing

from engrossing, regrating or forestalling the market, all of which were based on the prevention of artificial prices for the necessaries of life. No one of these falls under Federal jurisdiction, but each is subject to state control only. To prove a monopoly as is here alleged, the Government must show that the monopoly was created by unlawful means and that the defendants, *when the petition was filed,* were using *unlawful* means to exclude others from the trade.

(5) The present litigation is between the Federal Government and certain of its citizens. The questions involved are solely the rights of these Federal citizens and the effect upon those rights of the Sherman Act, and whether these Federal citizens have violated the provisions of that Act.

The violation of that Act, the Act itself makes a crime, and the Government must prove the commission of such crime by acts unlawful under Federal laws, and Federal laws only. State laws, common or statutory, cannot be used to piece out defective Federal laws or as a substitute for the same.

There was and is no such thing as a Federal crime, aside from express Congressional acts, and as no such act was in existence prior to 1890, as to the matters charged in the petition, all the matters and things done by the defendants prior thereto are immaterial.

(6) The Government's case depends solely and only on the Sherman Act, which Act is wholly prospective

and not at all retrospective. The Petition asking for equitable relief must of necessity assert, and the Government must maintain, that when the Petition was filed in November, 1906 (and not at some prior time), the appellants were *then* actually engaged in illegally restraining and monopolizing interstate and foreign trade in oil, contrary to the provisions of that Act. In such proceedings as this, the sole and only relief the Government can ask, is to prevent, restrain and prohibit the continuation of the particular things which are violations of the Sherman Act.

(7) This case involves, and only involves, the question of the restraint and monopolization of inter-state and foreign trade in oil in November, 1906, when the Petition was filed; it does not involve any alleged restraint or monopoly of the oil industry in any of the States, and even if it had been proved (which it has not) that the defendants monopolized the production and refining of oil in each of the States in which it carried on business, or that it monopolized the sale of oil in each of those States (which it has not), these would in no way aid the Government in the maintenance of the present suit, which involves only the question of the violation of the Federal Statute, which statute is passed to protect only interstate and foreign trade.

(8) The fact that the Standard Oil Company of New Jersey, when the petition was filed, was the owner, either by direct title or through stock ownership where the legal title was vested in other corporations, of certain refineries, pipe lines, reservoirs, tank cars and other property, and was using them all under one ultimate management for the production or purchase of crude oil, its transportation and storage, and the refining of it and its products, and the sale of the same,

does not of itself violate the Sherman Act. The appellants were lawfully entitled to so hold and use in interstate trade such combined properties.

To succeed in this case, the Government must also show that the said Standard Oil Company was then in 1906 *using its power to actually restrain inter-state or foreign trade in oil, or was then in* 1906 *excluding or attempting to exclude by illegal means others from said trade and attempting to monopolize the same, or a part thereof.*

(9) The Sherman Act does not *compel* private traders, however organized, to compete with each other; and especially if such traders, as joint owners of a group of properties used as one whole, are engaged in carrying on trade and commerce, it does not compel these owners to use certain units of the group to compete with other units of the same group. Private traders may jointly own and use in trade different refineries or stores that might, if each were owned separately, be used in competition with the others. The doctrine of *potential* competition as used by the court below is unauthorized by the Sherman Act.

(10) The character of the oil business was and is such that a great corporation was and is an economic necessity for carrying on that industry; the facts in this case and the history of the development of the oil industry prove that what is commonly called the Standard Oil Company was the necessary means by which the industry was fostered and advanced, and without which it would have languished and been much less successful. The growth and success of the Standard Oil

Company was the result of the individual enterprise and the natural laws of trade, and the position gained by it was the natural result of the lawful use of competition directed to a unique and unparalleled business by a group of strong, earnest, intelligent men, with abundant capital, where the risks and the uncertainty of the business justified more than usual profits in the handling of the same. It was not the result of unlawful means, but of skill, unremitting toil, denials and hardships, where continuous use of skill, labor and capital in forty years reached a great success.

(11) To prove a violation of section one of the Sherman Act the Government must clearly show that when the petition was filed we were then actually restraining interstate trade in oil.

To prove a monopoly under section two of the Sherman Act, the Government must show:

(1) That the appellants were, when the Petition was filed, then using unlawful means to maintain their control of the industry.

(2) That the appellants were then by unlawful means excluding others from said industry.

DISCUSSION.

This case is one where individual citizens, being the joint owners of private non-competitive properties, are using the same in private trade.

They are not in a public or *quasi*-public business. Their business is confined to one thing only: i. e., crude petroleum and its products. They are producers, manufacturers and traders in it. As such, their rights and privileges are far different from those of railroads or gas companies or business occupations impressed with a public duty. They may deal with whom they choose and refuse to deal with others. They may compete for the whole interstate trade in oil and lawfully win. The extent of their properties, the extent of their business, the eager energetic methods with which it is carried on, are not forbidden, but are encouraged by the law. The partnerships, limited partnerships and corporations through which they work are all private traders, and if the Petition in this case is to be believed, managed and controlled by the seven individual appellants.

Their pipe line system is an indispensable and absolutely necessary adjunct to their refineries, to transport to them the oil. They do carry principally from the wells to their reservoirs or tanks oil for others; but this is a distinct and comparatively small part of their business, and does not characterize or stamp or necessarily connect itself with their other and main business of refining crude petroleum and selling the refined oil and its by-products.

The consideration of the case should begin with a recognition of these facts, and the acknowledgment of the truth

that such cases as those of the Trans-Missouri Freight Association, the Joint Traffic Association and the Northern Securities Company are entirely different, governed by different rules; and to consider them is merely to mislead, as the Northern Securities case misled the Court below.

We should also remember that the Court below declined to find in favor of the Government on the charges in the petition of fraud and unlawful conduct which were denied in the answer and on which issue was joined.

This case only involves interstate and foreign commerce; and limiting even the word "commerce," I further state that this case only involves interstate trade in oil and its products. I include in the word "trade"—

(a) the article traded in while, but *only while*, it is in actual transit from one state to another;

(b) the bargaining for the same or exchange of the articles;

(c) the transportation from one state to another of the articles.

All three of these make up the inter-state and foreign trade. Such trade has no direct relation to the *ownership* of the article traded in, but solely and only to its presence as the thing transported and bargained about. When you speak of inter-state trade, you mean not the article dealt in, except as the object of trade, but the bargaining for the sale and the transportation of that article between the states.

The oil, before it goes into inter-state trade, and after it leaves such trade, is not under federal control. Such control exists only while it is the subject of such trade.

The federal Government does not concern itself with how one acquired the article put into inter-state trade or what becomes of it after it leaves such trade.

When the article traded in has been joined with the general mass of state property, it has passed out of inter-state trade, and no matter what may be the future means used to gain the state trade in that article, this does not violate the Sherman Act or bring it under federal control.

Anything, then, done *before* the oil got into inter-state commerce, or *after* it got out of inter-state commerce, cannot be a violation of the Sherman Act.

This case in nowise involves any question under the statutory laws of any of the States, or of the common law of any of the States in reference to what constitutes a restraint of trade or a monopoly of trade, or any policy of Ohio or Illinois. No matter what violations there may or may not have been of State laws or of the common law of any one of the States as to restraint of trade or monopoly, such are now and here wholly unimportant.

As the Supreme Court said in the *Knight* case, 156 U. S., 10,

> "the monopoly and restraint denounced by the Act are the monopoly and restraint of inter-state and international trade or commerce."

and not

> "a monopoly in the manufacture of a necessary of life."

This case does not involve how or when or by what means the appellants acquired their title to all their properties; or whether in any respect they violated any of the State laws in so doing; whether, for example, in any State they gained a monopoly of the refining business or the pipe line business. All these things are matters between the several States and the appellants and not between the United States and the appellants.

In the *Lottery* case, 188 U. S., 321, 364, Chief Justice Fuller said:

> "The power of the State to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the General Government."

Douglass vs. Kentucky, 168 U. S., 488;
United States vs. E. C. Knight Co., 156 U. S., 16.

The present case solely and only involves *the use* of products of that property in the inter-state trade, and while it is so in it. Until it enters into the inter-state trade, its

acquisition and ownership are matters not within federal jurisdiction.

Fuller, C. J., said in the *Knight Case,* 156 U. S., 16, that Congress did not attempt by the Sherman Act to

> "*assert* the *power* to deal with *monopoly* directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control or disposition of property; * * * *or to make criminal* the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted."

Kidd vs. Pearson, 128 U. S., 1.

The extent to which Congress may control the ownership, is not here for discussion, for in the Sherman Act it is only sought to control—*not* the thing itself—(except where it authorizes its forfeiture) but contracts, combinations, conspiracies and monopolies which interfere with and restrain free open trade between the States. In this suit the petition mentions crude oil and its products. It alleges violations only of the Sherman Act.

The sole question is:

Are the appellants violating the Sherman Act; and the sole statute we have to study and construe is the Sherman Act. Unless the Government has proved that when the petition was filed the appellants were *then* actually violating the Sherman Act, its case fails.

Let me assume (what is not a fact) that the appellants have gained a monopoly of the manufacture of refined oil

and practically control the refining of oil in different States. Admittedly, that is not a matter of which this Court has, or, indeed, can have, jurisdiction. The alleged violation of State laws or the formation of State monopolies or the creation of restraints of trade inside the States is foreign to the discussion.

This case does *not* involve any title or property right of the appellants. All such titles and property rights are conferred and governed by the laws of the several States, and over those cases and over such property or property rights Congress has no control.

In the *Northern Securities Case,* Mr. Justice Harlan said that the purchase of stock in a State corporation—the acquisition and sale of property—were under State control; and he added that the Federal Courts or Federal laws could not compel the dissolution of a State corporation.

Northern Securities Case, 193 U. S., 197; *supra,* p. 89;
Kidd vs. Pearson, 128 U. S., 1.

These appellants have not been indicted and are not being tried on the criminal side of the court for something HERETOFORE done in violation of the Sherman Act. The Sherman Act does provide penalties for such violation, makes the crime a misdemeanor, and declares that, on conviction thereof, certain punishments shall be inflicted. That portion of the Act is the criminal portion, and clearly indicates a trial in the methods assured to the individual by the Constitution of the United States. Such a trial, under the Federal Constitution, Article III, must be by jury; the proof would have to be beyond a reasonable doubt; the charge would be a prior well-defined act; and the results would have far other and different consequences than under the present case.

In one sense, indeed, the two distinct, independent provisions of the Act, i. e., punishment for a crime already committed and prevention of further commission of a continuing crime—have close connection with each other; for to find an indictment on the criminal side as well as to file a petition on the civil side, requires proof of the identical crime. The difference is that on the criminal side you refer solely to the past, while on the civil side you refer solely to the time when the petition was filed.

The Sherman Act is a Criminal Statute. The proof of the Government must be plain, clear, and convincing.

United States vs. Freight Association, 58 Fed. 58, 77, Sanborn, J.:

"The Anti-Trust Act is a criminal statute."

Northern Securities Company vs. United States, 193 U. S., 197, 401, Holmes, J.:

> "The *statute* of which we have to find the meaning *is a criminal statute.* The two sections on which the Government relies both *make certain acts crimes.* That is their immediate purpose and that is what they say. It is vain to insist that this is not a *criminal proceeding.* The words cannot be read one way in a suit which is to end in fine and imprisonment and *another way in one which seeks an injunction.*"

In *United States vs. Reading Co. et al.,* decided in the Third Circuit on December 8, 1910, under the Sherman Act, Judge Gray said:

> "The things herein charged are violations of law, and constitute the crimes denounced by the act. We refrain from saying that, on that account, the degree of proof of their commission should be that required upon the trial of indictments therefor. It suffices to say that the evidence should be such as to convince the mind of the tribunal to which it is addressed that the acts denounced by the law have been committed. The consequences attending the finding of the defendants guilty of the acts charged in the petition in this proceeding are certainly very serious, not only to the defendants, but to a large portion of the public and to many innocent persons involved in these transactions."

In considering the degree of proof in a civil case such as this, the Supreme Court of Missouri said in *State vs. Continental Tobacco Co.,* 177 Missouri, page 1:

> "However, it must be remembered that this proceeding partakes of the nature of a criminal prosecution, severe penalties are imposed; hence, it is not sufficient to warrant a finding adverse to respondents, that we may entertain strong suspicions, or even strong probabilities, of their guilt.

"Such conclusion should only be reached upon a clear showing of the testimony, fully satisfying the minds of the Court that they were guilty of the violations of the law as charged in the information."

The Sherman Act has no retroactive effect, but is prospective only.

The Supreme Court said in the *Trans-Missouri Case,* 166 U. S., 342, that

"there can be no question of any act being regarded as a violation of the *statute* which occurred *before it was passed.*"

In *Dueber Watch Company case,* 66 Fed. Rep., 637, 641, the Circuit Court of Appeals said that the only acts that the plaintiff could contend were forbidden by the Sherman Act

"are those done after its passage."

That the case involves the Sherman Act only, and not some supposed Federal common law, and is governed and must be determined solely by the Act, seems perfectly plain.

The prayers of the petition for relief are only under the Sherman Act.

Thus the first prayer is that the Court decree that the acts done are

"in violation of the Act of Congress of July 2nd, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.' "

The second prayer is for a decree that the individual defendants

> "in violation of the provisions of Sections 1 and 2, respectively, of the said Act of Congress approved July 2nd, 1890, entered into an agreement," etc.

The third prayer is that the

> "holding, ownership and control over said various defendant corporations by the said individual defendants, and by the Standard Oil Company of New Jersey, be decreed to be in violation of said Act of Congress."

So each of the other prayers is based solely on the Sherman Act.

There is no other federal statute authorizing the filing of such a petition, or giving the extraordinary power to a court of equity to restrain the commission of a crime in such cases as are alleged in the petition.

The first prayer in so far as it asks for a decree that the acts done under the alleged conspiracy

> "are in derogation of the common rights of all of the people of the United States"

is probably rhetorical and so intended, because no one could suppose this court had such power.

The *Wilson* Act merely refers to imports from foreign nations, and not to interstate or foreign trade, and therefore has no application to this case.

In the *Addyston Pipe Case,* 78 Fed., 712, where the United States filed a petition under Section 4, the Court said:

> "In a suit such as this, in the name of the United States jurisdiction depends *alone* upon the (Sherman) act."

Not upon any alleged Federal common law, but solely upon the Sherman Act.

As Mr. Justice Peckham said in *Hopkins vs. United States,* 171 U. S., 578, 586:

> "The relief sought in this case is based exclusively on the act of Congress approved July 2, 1890, c 647, entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies.'"

The size or magnitude of a business is not controlled by the Sherman Act, and therefore the size of the Standard Oil Company, its large properties, resources and power are just as lawful under the Sherman Act as if it owned one refinery instead of eighteen, or one mile of pipe line instead of thousands.

The Court below so ruled. Judge Sanborn said:

"* * ** monopolies of part of interstate and international commerce by legitimate competition, *however successful,* are not denounced by the law and may not be forbidden by the Courts." (Rec. A, p. 585).

Judge Hook said:

"Magnitude of business does not, alone, constitute a monopoly, nor effort at magnitude an attempt to monopolize." (Rec. A, p. 589).

And again Judge Hook said (Rec. A, p. 590):

"Success and magnitude of business, the rewards of fair and honorable endeavor, were not among the evils which threatened the public welfare and attracted the attention of Congress."

In the *Northern Securities Case* (193 U. S., 407), Justice Holmes said, speaking of the size of the corporation or its wealth or power:

"* * * * the act of Congress makes no discrimination according to size. Size has nothing to do with the matter."

In *United States vs. American Tobacco Company*, 164 Fed., 700, 709, Judge Coxe said:

"It has never been held that the mere fact that a business is large and is extended over a wide territory renders its promoters amenable to the statute. Success is not a crime."

United States vs. American Naval Stores Co., 172 Fed., 455, 458, 459, (So. Dist. Ga., May 12, 1909):

District Judge Sheppard charging the jury in an indictment under *Sections One and Two* of the Sherman Act:

"* * * the essence of the monopoly 'is found not so much in the creating of a very extensive business in the hands of a single control.' *The size of a business is not in itself a violation of this law, and should carry with it no great weight in considering the second count* (under section two) *of the indictment.* The criminal act in the statute is the certain and necessary prevention of all other persons from engaging in such business, and thereby stifling competition. *The evil is not the enlargement of the trade* of one person or corporation, but the destruction of the trade of all other persons in the same commodity."

Commissioner Smith, of the Bureau of Corporations, says in his report:

"Corporate combination, as such, appears to be not only an economic necessity, but also largely an accomplished fact. * * * It is not the existence of industrial power, but rather its misuse, that is the real problem. * * ** Corporate methods, not corporate existence, is the question at issue. The Government should direct its attention toward preventing such unfair methods, and toward keeping open the opportunities for competition in industry."

This idea is very clearly expressed by Judge Jackson in *In re Greene*, 52 Fed., 104, 115:

"It is very certain that *Congress could not*, and did not, by this enactment, attempt to prescribe limits to the acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the *accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein*, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will, in a popular sense, monopolize both state and inter-state traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged and developed. But *the magnitude of a party's business*, production or manufacture, with the incidental and indirect powers thereby acquired,

and with the purpose of regulating prices and controlling inter-state traffic in the articles or commodities forming the subject of such business, production or manufacture, *is not the monopoly* or attempt to *monopolize,* which the statute condemns."

In re Corning, 51 Fed., 205, 211:

"From these debates it is evident that the Congress did not intend to limit the amount of capital a citizen should invest in any line of business, or restrain his energy or enterprise in acquiring for himself all the trade possible in such business, provided in doing so he did not, by illegal contracts or devices, restrain others from pursuing the same business, or deprive the public from enjoying the advantages of the free use of capital, skill and experience of competitors."

Eddy on Combinations, Sec. 177:

"The magnitude of the combination has a direct bearing upon the power, but not upon the character of the combination. The legality of a combination is not determined by the extent of its power or influence."

The Supreme Court of Illinois in *Coquard vs. National Linseed Oil Company,* 171 Ill., 480, 484, said:

"About the only fact, however, averred in the bill which might constitute a part of the facts necessary to show a trust is that the defendant has acquired a great many oil mills and plants, and is managing a large business. The facts pleaded are insufficient to show the existence of a trust."

In the *Mogul Steamship Case,* L. R., 23 Q B., 598, Lord Justice Bowen said (p. 618):

> "It is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital when used for purpose of competition, in the manner opposed by the arguments of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides."

The Sherman Act does not prohibit, but recognizes as lawful, in private trade, the association of individuals as joint owners, partners, or as corporations or trusts, to hold and use properties and engage in interstate trade and commerce.

Read the Act and this point is demonstrated:

Section 1 does not prohibit

> "combinations in the form of trust or otherwise;"

but only prohibits them when they are

> "in restraint of trade or commerce among the several states."

Section 2 does not denounce either trusts or partnerships or corporations or joint owners from engaging in inter-state commerce, but only prevents them when they

> "combine or conspire"
>
> "to monopolize any part of the trade or commerce among the several states."

Section 8 defines "person"

> "to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any state, or the laws of a foreign country."

In the *United States vs. Joint Traffic Association,* 171 U. S., 505, Mr. Justice Peckham said (567):

> "* * * we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership."

Chesapeake & Ohio Fuel Co. vs. United States, 115 Fed., 610, 620, Day, Circuit Judge:

> "Looking, then, to the contract in question, we find fourteen of the coal producers of this district, whose aggregate production is five thousand tons a day, entering into an agreement which, *without making a partnership,* undertakes to control the entire output of the several mines."

Northern Securities Co. vs. United States, 193 U. S., 197, 410, Holmes, J.:

> *"A partnership is not a contract or combination in restraint of trade* between the partners unless the well known words are to be given a new meaning invented for the purposes of this act."

Oakdale Manufacturing Co. vs. Garst, 18 R. I., 484; 23 L. R. A., 639:

> "It does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would *forbid partnerships* and sales by those engaged in a common business. It would cut off consolidation to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage, which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule."

In *Dueber Watch Case Co. vs. Howard Watch Co.,* 66 Fed., 637, 643, Judge Lacombe, for the Circuit Court of Appeals, said:

> "The total amount of any given commodity which will be purchased by a community is limited, and when several sellers of such commodity *enter into a combination in the form of a partnership, and by* ingenious advertising, or by the devices of business *competition,* or by the offer of favorable terms to buyers, enlarge their own trade in such commodity, they restrain to some extent the trade of one or more of their competitors therein. But no one, not

even the plaintiff-in-error, *contends that the statute forbids any such acts,* although, if the words be taken with absolute literalness, the phrase 'restraint of trade' is broad enough to cover them."

In re Greene, 52 Fed., 104, Judge Jackson:

"It is very certain that Congress could not and did not, by this enactment, attempt to prescribe limits to the acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the *accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein,* or any part thereof, among the States, a criminal offense was committed by such owner or owners. (115) * * * Congress may place restriction and limitations upon the right of corporations created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. *But Congress certainly has not the power or authority under the Commerce clause, or any other provision of the constitution, to limit and restrict the right of corporations, created by the States, or the citizens of the States, in the acquisition, control and disposition of property."* (112)

In *re Grice,* 79 Fed. 627, 642-3, 646.

Northern Securities Co. vs. United States, 193 U. S., 197, 361, Brewer, J.:

"Further, *the general language of the Act is also limited by the power which each individual has to man-*

age his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen."

In *Smiley vs. Kansas*, 196 U. S., 447, Mr. Justice Brewer said (456-457):

"Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom, parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power, and those which are subject to prohibition or restraint. But a secret arrangement, by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed, *without any merging of interests through partnerships or incorporations,* is one to which the police power extends."

The Sherman Act was passed to further trade, and any private trader may lawfully join with him any competitive private trader, or buy his business and property and unite such property and business with his own.

We turn again to the words of the Sherman Act—

Nowhere in it is there any prohibition of the joining of any two or more together as partners or joint owners or in corporate form, to carry on business. There is no word prohibiting the joining of a competitor or the purchase of his

business or property. On the contrary, the words of Sections One, Two and Eight, by plain implication, so allow.

And such is also the result of the cases under it.

IT IS NOT ILLEGAL UNDER THE SHERMAN ACT FOR INDIVIDUALS TO BUY UP THE PROPERTIES AND BUSINESS OF COMPETITORS.

Northern Securities Co. vs. United States, 193 U. S., 361, Brewer, J.:

> *"Further, the general language of the Act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen.* If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company, he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall vs. Great Northern Railway,* 161 U. S., 646, in which this Court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Rail-

way Company: 'Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the re-organized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common.' "

See Mr. Justice Holmes to the same effect:
Northern Securities Case, 193 U. S., 409;
Smiley vs. Kansas, 196 U. S., 457;
In re Greene, 52 Fed., 104.

Davis vs. Booth, 131 Fed., 31;

The Court (Severens, J.) said (p. 37):

"It may be that the practice of acquiring by a single corporation, through purchase of a great number of single plants in several states, of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but if so, it would seem that the limitations and the means for the restriction and correction required must be supplied by the lawmaking power, since the old law against forestalling the market has become obsolete."

In this last case a writ of *certiorari* was denied by the Supreme Court: 195 U. S., 636.

Robinson vs. Brick Company, 127 Fed., 804 (C. C. A.):

A number of competing brick plants in West Viriginia and Ohio agreed to sell their plants to one corporation and

gave restrictive covenants. Afterwards in attemtping to enforce these covenants, the Court overruled a defense that the whole transaction was void, *inter alia,* under the Sherman Act.

Cincinnati Packet Co. vs. Bay, 200 U. S., 179:

The Packet Company had bought up a number of rival packet companies on the Ohio River trading between Cincinnati, Portsmouth and the intervening towns in Ohio and Kentucky. In attempting to enforce a restrictive covenant contained in the agreement of sale it was objected that the whole transaction was void under the Sherman Act.

The Court, Mr. Justice Holmes, seemingly assuming that the purchases were not illegal, held that whatever restraint of trade resulted from the competitors going out of business was incidental and remote.

United States vs. Joint Traffic Association, 171 U. S., 505, 567:

> "We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the Act; and it was said that such a contract was collateral to the main contract of

sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business."

United States vs. Addyston Pipe & Steel Company, 85 Fed., 271.

Among the agreements which Judge Taft in the above case cited as being perfectly valid both at common law and under the Act of 1890, was a restrictive covenant by a seller of a competing business that he would not engage in business to the injury of the good will sold. And he said (280):

"'It was of importance, as an incentive to industry and honest dealing and trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell."

In *Dolph vs. Troy Laundry Machinery Co.,* 28 Fed., 553, 555, Judge Wallace said:

"It is not obnoxious to good morals, or to the rights of the public, that two rival traders agree to consolidate their concerns, and that one shall discontinue business, and become a partner with the other, for a specified term. It may happen, as the result of such an arrangement, that the public have to pay more for the commodities in which the parties deal; but the public are not obliged to buy of them. Certainly, the public have no right to complain, so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly."

United States vs. E. C. Knight Co., 156 U. S., 1.

National Benefit Company vs. Union Hospital Company, 45 Minn., 272 (11 L. R. A., 437, 440), Mitchell, J.:

"The general *concensus* of all the authorities, at least the later ones, is * * * that *a party may legally purchase the business and trade of another for the very purpose of removing or preventing competition.*"

Diamond Match Company vs. Roeber, 106 N. Y., 473, 483:

"we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition."

Trenton Potteries Company vs. Oliphant, 58 N. J. Eq., 507 (46 L. R. A., 255, 263):

"A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restriction, if such could be imposed upon the acquisition of such property, and its use when so acquired, courts could impose no limitation. * * * It follows that *a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or, for a time at least, destroy competition.*"

See the very late opinion of Judge Lurton in the *Calumet & Hecla Company Case.* (Ante, p. 128).

To prove that the appellants conspired to monopolize or did monopolize a whole or part of the interstate trade in oil, the Government must show that the appellants

(1) Conspired to obtain control of such trade by *excluding others from it.*

(2) Conspired to do this by the use of *unlawful* means. If a combination did exist, and the appellants actually gained such a monopoly by *lawful* means, through the legitimate growth and development of its business, and by the lawful use of competition, then they were not guilty of a violation of the Sherman Act—even though they *excluded* to some extent others from such business.

In other words:

A lawful monopoly may be gained under the Sherman Act.

The Court below so ruled in this case (Rec. A, p. 585):

"* * * monopolies of part of inter-state and international commerce by legitimate competition, however successful, are not denounced by the law and may not be forbidden by the Courts."

See also Judge Hook's opinion.
Justice Holmes, 193 U. S., 408.
Judge Putman, 55 Fed., 640.
Judge Sanborn, 125 Fed., 454.

It is only the monopoly gained by using UNLAWFUL means, and thus excluding others from the trade, that the Sherman Act condemns.

In the opinion of the lower Court in this case Judge Sanborn said of the Sherman Act (Rec. A-585):

> "Its true construction is that while *unlawful means* to monopolize and to continue an unlawful monopoly of inter-state and international commerce are misdemeanors and enjoinable under it, monopolies of part of inter-state and international commerce, by *legitimate competition, however successful,* are not denounced by the law."

And in his concurring opinion Judge Hook said (Rec. A-589, 590):

> "*Magnitude* of business does not, alone, constitute a monopoly, nor effort at magnitude an attempt to monopolize. To offend the act the monopoly must have been secured by *methods contrary to the public policy* as expressed in the statutes or in the common law. * * *
>
> "Success and magnitude of business, the rewards of fair and honorable endeavor, were not among the evils which threatened the public welfare and attracted the attention of Congress. But when they have been attained by *wrongful or unlawful methods,* and competition has been crippled or destroyed, *the elements of monopoly* are present."

This Court said in *National Cotton Oil Co. vs. Texas,* 197 U. S., 129, that a monopoly is now

> "understood to include 'a condition produced by the acts of mere individuals.' Its *dominant thought* now

is, to quote another, 'the notion of *exclusiveness* or unity;' in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.'"

Holmes, J., in the *Northern Securities Case,* 193 U. S., 401, again emphasized the idea that monopoly was exclusion.

In *Whitwell vs. Continental Tobacco Co.,* 125 Fed., 454, the Court expressly held that the Tobacco Company had gained a monopoly of part of the tobacco trade, but upheld it as lawful under the Sherman Act.

United States vs. Trans-Missouri Freight Association, 58 Fed., 82, Sanborn, J.:

"A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control."

It is grasping the control of a trade by a few persons who have combined and conspired with each other for the purpose and with the intent and with the idea of gaining by all means the power to control by improper means for the maleficent purpose of fixing the price of the article dealt in. It involves the use of unlawful means—force and fraud—stamped by the law as criminal. It is in marked contrast to the *legitimate growth of a lawful business.*

The thing the monopolist seeks for and gains is the ability to control prices and suppress competition; while the thing the competitor seeks for is the *extension of his trade by lawful means.* This extension may give control of trade and enable one to fix prices, but it is the reward of competition which the law allows. The successful trader may not gain such absolute control, and if he does, will hardly continue to hold it if the door of competition is left open.

The mere ability of a merchant to fix the price at which he will buy and sell any given line of goods is his individual right, and if he has partners, the right of his associates and of the partnership. So long as he restricts that right to fixing his own price at which he will buy or sell this line of goods, he is strictly within his lawful rights, and no one may complain. Indirectly the price that he pays may affect the market price, and probably will, but in so far as he merely fixes his own prices and does not seek by devices and tricks and any lawful means to fix the price for others, he is not committing an unlawful act.

Judge Taft's Definition of Monopoly.

Judge Taft, not indeed, from the Bench, where, I agree, the authority would be more pronounced, but with great solemnity in his inaugural address on March 4th, 1909, speaking of American business and the stability and certainty of the same, said that any plan determined upon by the Federal Government.

> "must include the right of the people to avail themselves of those *methods of combining capital and effort deemed necessary to reach the highest degree of economic efficiency at* the same time *differentiating* between com-

binations *based* upon *legitimate economic reasons,* and those *formed* with the *intent* of creating monopolies and *artificially* controlling prices."

Judge Taft, on August 19th, 1907, at Columbus, Ohio, referring to the Sherman Act, said:

"The Supreme Court of the United States has not defined what a monopoly under this section of the anti-trust law is. I conceive that it is *not* sufficiently defined by saying that it is the *combination* of a large part of the plants in the country engaged in the manufacture of a particular product in one corporation. There *must be something more* than the mere union of capital and plant before the law is violated. There must be some use by the company of the comparatively great size of its capital and plant and extent of its output *either to coerce* persons to buy of it rather than of some competitor, or to coerce those who would compete with it to *give up their business.* There must, in other words, be an element of duress in the conduct of its business towards the customers of the trade and its competitors before mere aggregation of plant becomes an unlawful monopoly."

In *Wharton's Criminal Law,* Vol. 2, page 219, sec. 1369, it is stated that to constitute a monopoly there must be shown that

"the combination acts through *coercive* or *fraudulent* means, or involves the absorption of an entire necessary staple."

United States vs. Patterson, 55 Fed. Rep., 605, 635, Putnam, Circuit Judge:

"Ordinarily a case cannot be made under the statute unless the means are shown to be *illegal,* and therefore it is ordinarily necessary to declare the means by which it is intended to engross or monopolize the market."

United States vs. American Naval Stores Co., 172 Fed., 455, 458, 459 (May 12, 1909).

Sheppard, J., charging the jury in indictments for violations of Sections One and Two:

"It is sometimes difficult to distinguish between a legitimate business enterprise and an illegal monopoly. From the law as has been interpreted, it may be said, however, that the monopoly is the power acquired over the traffic, sale and purchase of a commodity, in the course of inter-state or foreign commerce, by which the free flow of such commerce and competition in such commodity is necessarily crushed and stifled. Since the size of the business alone is not necessarily illegal, it is the crushing of competition, by *means of force, threats, intimidation, fraud or artful and deceitful means and practices,* which violates the law. You will consider carefully all the *means* which the indictment charges, and inquire (1) whether the defendants, or any two or more of them, did in fact unlawfully combine, conspire, confederate, and agree together to 'monopolize,' by acquiring such power over the disposition of rosins, turpentine, and naval stores, which were the subject of inter-state and foreign commerce, so that they were capable of forming and did form, a scheme to crush and stifle competition; and (2) if such scheme of gaining

and controlling business was to be effected *by illegal methods of force, threats, intimidation, fraud or artful or deceitful means and practices,* which their competitors in such trade were necessarily unable to meet. The size of business, and the gaining of business popularity, fair dealing, sagacity, foresight, and honest business methods, even if it should result in acquiring the business of competitors, would not make an illegal monopoly. It is the acquisition and use of unfair and illegal power in defeating competition which makes such illegal monopoly."

Fonotipia Limited vs. Bradley, 171 Fed., 951, 959 (E. Dist. N. Y., Aug. 7, 1909):

Chatfield, District Judge:

"* * * nor is a 'monopoly,' in the sense meant by the statute, *merely the complete occupation of a certain field where that occupation does not unfairly exclude other competitors.* The fact that a certain person is the only dealer in certain goods may be entirely consistent with a free and unlimited opportunity to every other person to deal in the same goods, and the law of proper demand and supply may result in but one source from which certain things can be secured, without thereby rendering the person supplying these goods liable to the accusation of illegally maintaining a monopoly. A certain intent and certain motives, which need not be discussed at length, must be present to establish the interference with competition and the existence of the monopoly at which the statute above mentioned was aimed and which is included within its provisions. A mere attempt to obtain a fair profit, even by an agreement not to undersell, must be tested by the measure of

what would be a fair price under competition, and it must be determined whether the centralization or control of the output is intended to or does accomplish any interference with the free action of independent parties who might compete, or with the securing to the public of all the benefits to which they are entitled, over and above the reasonable cost of production and reasonable profit."

United States vs. American Tobacco Co., 164 Fed., 700, 722, 727. Judge Ward, in his dissent, said:

"It remains to inquire whether the American Tobacco Company and its controlled companies constitute a monopoly of or attempt to monopolize a part of the foreign commerce or commerce between the states under the second section of the Sherman Act. As this section prohibits a monopoly of or an attempt to monopolize any part of such commerce it cannot be literally construed. So applied, the act would prohibit commerce altogether. The first and second sections must be read together, and I think mean the same thing; the second adding nothing except to extend the prohibition to individuals who, without combination, monopolize or attempt to monopolize. *It must* be understood to *prohibit monopolies* or attempts to monopolize *brought about by the unlawful means contemplated in the first section,* viz., the purpose to restrain trade by *preventing competition* and preventing others from participating in it. The third section of the act bears out this construction, because it does not mention monopolies, or attempts to monopolize in the territories or District of Columbia, where the jurisdiction of the United States is supreme in all things, and it can hardly be that Congress intended to declare innocent acts committed within them which it pronounces crimes if committed in the states."

West Virginia Transportation Company vs. Standard Oil Company, 50 W. Va., 611, 617 (1900):

> "This monopoly * * * is the act of persons and corporations, by union of means and effort, drawing to themselves, in the field of competition, the lion's share of trade. This is not monopoly condemned by law."

JUDGE SANBORN'S OPINION IN THE CONTINENTAL TOBACCO CASE.

Whitwell vs. Continental Tobacco Company, 125 Fed., 454:

The defendant, a corporation engaged in the manufacture and sale of tobacco, refused to sell its product to dealers except at unprofitable prices unless they agreed not to sell the products of the defendant's competitors. The plaintiff attempted to purchase goods of defendant, but refused to refrain from handling the product of its competitors, and brought action to recover damages caused by the refusal of the defendant to sell him his commodities except at unprofitable prices.

Held, that the plaintiff had no cause of action.

This judgment was affirmed by the Circuit Court of Appeals in an opinion by Judge Sanborn, in which he said:

> "The test of the legality of a combination under the act which was inspired by this purpose is its direct and necessary effect upon competition in commerce among the states. If its necessary effect is to stifle or

to *directly and substantially* restrict free competition, it is a contract, combination or conspiracy in restraint of trade, and it falls under the ban of the law. * * *

(457-458) "If, on the other hand, it *promotes* or but incidentally or indirectly restricts competition, while *its main purpose* and chief effect are to *foster the trade* and to *increase the business* of those who make and operate it then it is not a contract, combination or conspiracy in restraint of trade within the true interpretation of this act, and it is not subject to its denunciation. * * *

(462) "*It is admitted that the practice of the defendants was not only an attempt, but a successful attempt to monopolize a part of this commerce.* But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by Sec. 2 of * * * (the Sherman Act)? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of inter-state commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of inter-state commerce is *the very root of all competition therein.* Eradicate it, and competition necessarily ceases—dies. Every person engaged in inter-state commerce necessarily attempts to draw to himself and to *exclude* others from, a part of that trade; and, if he may not do this he may not compete with his rivals, all other persons and corporations must cease to secure for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly.

"The purpose of the Act of July 2nd, 1890, was, however, to *prevent the stifling of competition,* not to destroy it, or to foster monopoly, and any construction

of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law. It is an interpretation which fosters the mischief it was passed to remedy, and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and to promote the remedy. It cannot, therefore, be the true meaning of the second section of this law that every attempt to monopolize any part of inter-state commerce is illegal. The act must, as the Supreme Court has twice declared * * * have a reasonable construction. The purpose of the second section is the same as that of the first—to prevent the restriction of competition—and the two sections ought to receive *similar* interpretations. The Supreme Court has declared that the true construction of the first section is that no contract, combination or conspiracy is denounced by it unless its *necessary* effect is to directly and substantially restrict competition in commerce among the states. By a parity of reasoning, the correct interpretation of the second section must be that no attempt to monopolize a part of commerce among the states is made *illegal or punishable* by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states * * * It was not—it could not have been—the purpose or the effect of the second section of this law to prohibit or to punish the customary and universal attempts of all manufacturers, merchants and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind. * * * (463) An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and

substantially restrict competition and commerce among the states, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes or but indirectly or incidentally restricts competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made and was not made illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the states."

In *Phillips vs. Iola Portland Cement Co.*, 125 Fed., 593, 594, it is said by the same judge:

"It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination or conspiracy challenged under the anti-trust law is the *direct effect* of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition or to directly and substantially restrict it, it is void. But if it *promotes,* or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices

do not necessarily have a direct and substantial effect to restrict competition in commerce among the states."

The Supreme Court refused a *certiorari* in this case. See 192 U. S., 606.

MONOPOLY, REGRATING, FORESTALLING.

The history of these is shown in the old English text-books:

First Russell on Crimes (p. 252):

"Monopolies are much the same offense in other branches of trade that engrossing is in provisions; * * * They are said to differ only in this, that monopoly is by patent from the King, ingrossing by the act of the subject, between party and party; and have been considered as both equally injurious to trades and the freedom of the subject, and therefore equally restrained by the common law.

"By the common law, therefore, those who are guilty of this offense are subject to fine and imprisonment, the offense being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom."

In *Blackstone's Commentaries*, Book 4, * page 159, it is said:

"Monopolies are much the same offense in other branches of trade that engrossing is in provisions: being a license or privilege allowed by the King for the sole buying and selling, making, working or using of anything whatsoever; whereby the subject in general is re-

strained from that liberty of manufacturing or trading which he had before."

First Hawkins Pleas of the Crown, 8th Ed., p. 624:

"A monopoly is an allowance by the King to a particular person or persons of the sole buying, selling, making, working or using of anything whereby the subject in general is restrained from the freedom of manufacturing or trading which he had before. Monopoly differs from ingrossing only in this, that monopoly is by patent from the king, and engrossing by act of the subject between party and party."

Bacon's Abridgement, Title of Monopoly, p. 22:

"A monopoly is described by My Lord Coke to be an institution or allowance by the king by his grant, commission or otherwise, to any person or persons, bodies, politic or corporate, of or for the sole buying, selling, making, working or using of anything, whereby any person or persons, bodies politic or corporate are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.

"Monopoly and engrossing differ only in this, that the first is by patent from the king, the other by act of the subject, between party and party; but are both equally injurious to the trade, and the freedom of the subject, and therefore are equally restrained by the common law."

See Justice Fields' opinion in the *Slaughter House Cases,* 16 Wall., 101.

In the *Butchers Union Case,* 111 U. S., 755, Mr. Justice Field said:

> "A monopoly is defined 'to be an institution or allowance from the sovereign power of the state by grant, commission or otherwise to any person or corporation, for the sole buying, selling, making, working or using of anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.' All grants of this kind are void at common law because they destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood, and put it in the power of the grantees to enhance the price of commodities. *They* are void because they interfere with the *liberty* of the individual to pursue a lawful trade or employment."

The Supreme Court of the United States in the *Charles River Bridge Case,* 11 Peters, 607, states that a monopoly as understood in law is

> "An exclusive right granted to a few, of something which was before of common right."

Fields, J., gave the same definition in the *Slaughter House Case,* 16 Wallace, 102.

McKenna, J., in *National Cotton Oil Co.,* 197 U. S., 129, said that a monopoly is now

> "understood to include 'a condition produced by the acts of mere individuals.' Its *dominant thought* now is, to quote another, 'the notion of *exclusiveness* or unity.'"

Holmes, J., in *Northern Securities Case,* 193 U. S., 409, again emphasized the idea that monopoly was exclusion.

In the time of Lord Coke and prior thereto engrossing, regrating and forestalling were each crimes at common law, and related to the mere necessaries of life. The reason they were held to be crimes was that the public were prevented from acquiring the *necessaries* of life at the prices fixed by the law of competition. The law embraced only the things which one went to the market to buy.

Blackstone says that *forestalling*

"makes the market dearer to the fair trader (4th Book, *158);

that *regrating*

"also enhances the price of the provisions" (4th Book, *158);

that *engrossing*

"must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion." (4th Book, *159).

It was then to protect the public from artificial and high prices for the things they ate, and this was the reason for and the foundation of that law.

But as to the trades and occupations in life, the courts held each Englishman (like each American) had, of right, access thereto, and, therefore, when the Crown granted a mononoply of the exclusive right to make and sell playing cards, the Court held the letters patent were void; not because the price of playing cards was increased, but *because* all

other Englishmen were excluded from making and selling the same. It was solely on the *exclusive* feature that such grants were held void.

Strictly speaking, *forestalling, engrossing* and *regrating* were a species of crime at common law, relating solely to the purchase and sale of provisions or the necessaries of life.

A *monopoly* was only the grant by the King of an exclusive right to carry on a certain trade which theretofore was common to all, thereby excluding all others from such trade.

They are distinct independent offenses arising out of distinct circumstances and founded on distinct and independent reasons.

DEFINITION OF MONOPOLY.

Remembering this, and also remembering that the Federal Courts look to the common law for a definition of words having there a known significance, we may at least assert that:

ANY DEFINITION SUCH COURTS GIVE OF MONOPOLY UNDER THE SHERMAN ACT WILL AT LEAST EMBRACE THE FOLLOWING ELEMENTS:

(1) The idea of exclusiveness—that one set of men exclude or keep out of a certain trade or business all other, or at least, some other men desiring to enter it;

(2) That such exclusion is effected by unlawful means;

(3) That as the Sherman act is passed avowedly to further competition, and as the very life of competition demands that the competitor who wins is lawfully entitled to the prize, if the exclusion of others is only because of successful competition, it is not unlawful.

Pettibone vs. United States, 148 U. S., 197, 203, Chief Justice Fuller:

"The courts of the United States * * * *resort to the common law for the definition of terms* by which offenses are designated."

Ex parte Wells, 18 How., 307, 321:

"When a term is used in our Constitution or statutes which is known at the common law, we look to that system for its meaning."

Crime.

Monopoly carries with it the idea of crime. To be a monopolist is to be a criminal. It denotes wrongdoing. The successful merchant who gains as the reward of competition 60 or 80 or 90 per cent of, say, the oil trade of 1906, is not a monopolist or a wrong-doer by reason thereof, any more than the fur merchant who gains the January trade in sealskins.

Monopoly under the Sherman Act.

The word "monopoly" has at least three meanings: one is that which includes lawful monopolies, such as patents—a trade governed by a secret process for making the article of commerce; another is a temporary control of the market in

any one line gained by lawful means in competition. The third and *invidious* sense is the control or engrossing of the market by unlawful means. In either case, except perhaps a patent, the basis of monopoly is contractual.

Every trader, like every professional man, monopolizes a certain portion of the trade or profession; that is, he has the exclusive use and control of that certain portion, and he allows no one to interfere with that exclusive use and control if he can help it, and this is a necessary law of trade, without which trade could not be carried on.

This idea is expressed by Mr. Justice Holmes in the *Northern Securities Case*, 193 U. S., 197, 406, as follows:

> "According to popular speech every concern monopolizing whatever business it does and if that business is trade between two States it monopolizes a part of the trade among the States. Of course the statute does not forbid that. It does not mean that all business must cease."

But the Sherman Act does make an attempt to monopolize

"any part of trade or commerce among the several states" a misdemeanor. To give a liberal and broad meaning to the word "monopoly," as it was argued in the Trans-Missouri and the Freight Association cases, would include every act of a trader in the acquisition of any part of the trade or commerce among the several states. Its liberal construction, therefore, is impossible.

The title of the act is to protect trade and commerce and to protect them against

"unlawful restraints and monopolies."

A construction of Section 2 which literally enforced each of its words would not protect, but would destroy, interstate

trade, and would prevent ordinary corporations and partnerships and individuals from engaging in the same, because each man who enters that trade does seek to exclusively seize some portion of it.

In the *Joint Traffic Association cases,* 171 U. S., 566, the Court said that the argument had been pressed that the Sherman Act literally construed,

> "limits the freedom and destroys the property of the individual * * * and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat restraining trade and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal."

The court, on page 567, calls attention to the numerous instances of the organization of mechanics and their business, the formation of a corporation by several, a contract of partnership, the purchase by one wholesale merchant of the product of two producers, etc.

All these were cited by counsel as in support of the proposition that all restraints of trade were declared illegal under section one of the Sherman Act, and that such scope would include the simplest kind of trade. The court answered (567):

> "* * the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act. * * * In *Hopkins vs. United States*, decided at this term, *post*, 578, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of Congress must have a *reasonable construction* or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.' To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they

all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court."

What one man may lawfully do, two or more may join him in so doing, and the result is just as lawful as if done by one. If the thing done is unlawful even though done by one, it may not be of itself a crime —but if two or more unite in doing the same unlawful thing, this may constitute a crime.

But a lawful thing that one may do, is not made unlawful or criminal merely because several join in so doing.

In the *Mogul Steamship Case,* L. R., 1892, App. Cases, 25, at page 50, Lord Morris said:

"Again, what one trader may do in respect of competition, a *body or set of traders can* lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise. *I entertain no doubt* that a body of traders, whose motive object is to promote their own trade, can combine to acquire, and thereby in so far to injure the trade of competitors, provided they do no more than is incident to such motive object, and use no *unlawful means.*"

In *Macauley vs. Tierney,* 19 R. I., 255, the Supreme Court of Rhode Island said that

> "What a person may lawfully do, a number of persons may unite with him in doing without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful."

In the *Bohn Mfg. Co. vs. Northwest Lumbermen's Association,* 54 Minn., 223, 233, the Court said:

> "If any act be lawful, one that the party has a legal right to do, the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, 'the exercise by one man of a legal right cannot be a legal wrong to another,' or as expressed in another case 'malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful: *Heywood vs. Tillson,* 75 Me., 225; *Phelps vs. Nowlen,* 72 N. Y., 39; *Jenkins vs. Fowler,* 24 Pa., 308.
> * * * *
>
> "What one man may lawfully do singly, two or *more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful.* The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime

for several to conspire to commit an unlawful act, which if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case."

This principle is reaffirmed in *State vs. Duluth Board of Trade,* 107 Minn., 506, 545 (1910).

Martens vs. Reilly, 109 Wis., 464, 472:

"*An act legal in itself,* in that it does not offend against the criminal law and the injuries are *damnum absque injuria,* regardless of its violation of moral standards, whether such act be the one perpetrated or the means used to that end, *generally, if not the subject of a civil action for damages when done by one person, is not if done by many acting in concert.*"

National Protective Association vs. Cumming, 170 N. Y., 315, 58 L. R. A., 135, 138:

"Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act."

Collins vs. American News Co., 34 N. Y., Misc., 260, 263:

The Court said as to a combination of publishers to cut off the supply of a customer:

"What any publisher could lawfully do individually all the publishers may lawfully combine to do."

Jacobs vs. Cohens, 183 N. Y., 207; 2 L. R. A., N. S., 292, 294;

Park & Sons vs. National Druggists' Association, 54 N. Y. App. Div., 223, 227.

Bilafsky vs. Conveyancers' Title Insurance Co., 192 Mass., 504, 506:—

In this case Mr. Justice Loring said:

"This is one of those cases where the allegations as to conspiracy are at most allegations that what is alleged to have been done was done jointly. In such a case the acts alleged to have been done by the conspirators are not actionable unless they would have been actionable had they been done by the defendants severally."

Vegelahn vs. Guntner, 167 Mass., 92, 35 L. R. A., 722, 727. Holmes, J.:

"But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle. *Com. vs. Hunt*, 4 Met., 111, 38 Am. Dec., 346; *Randall vs. Hazelton*, 12 Allen, 412, 414. There was combination of the most flagrant and dominant kind in *Bowen vs. Matheson*, and in the *Mogul S. S. Co. Case*, and combination was essential to the success achieved. But it is not necessary to cite cases. It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of

combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed."

COMPETITION.

The means for the acquisition of trade which the law gives to every citizen of the United States and every one engaged in inter-state commerce, is competition. Competition, the law says, increases trade, and everyone who is a citizen of the United States may use competition to acquire a portion of the inter-state trade. The word itself carries its meaning—no definition of it makes it clearer or adds to the ideas which the word itself suggests. It denotes strife—struggle—with others. It means warfare for the same thing, and the end sought is that for which all strive.

Webster defines *competition*:

"The act of seeking or endeavoring to gain what another is endeavoring to gain at the same time;—

"Common strife for the same object."

In *Mogul Steamship Co. vs. McGregor,* L. R. 23, Q. B. 598, 626, Lord Justice Fry said:

"Competition exists when two or more persons seek to possess or to enjoy the same thing; it follows that the success of one must be the failure of another."

The strife is always to own exclusively the thing sought after and to own it, possess it, to the exclusion of all other per-

sons. If it be a prize, *i. e.*, a silver cup, I take it home as its sole exclusive owner, and no one may touch it unless I permit. If it be the intangible thing called business or trade among a dozen competitors, more than one may win a portion of it, but yet each strives for the whole, and the law does not limit the extent of the reward for each. The business or trade thus fought for is not a stationary, tangible thing like a silver cup; it is always in motion; it is the spring trade or the fall trade or the summer or winter trade, as it may be. Now there are 100 customers whose trade is sought for, and now 500. The customers themselves change. The locations of the customers vary, now here, and now there. Even in any one branch of trade, as, say the oil trade, now one sort of the product is demanded and now another. To compete for this trade is not *regrating* or *forestalling* or *engrossing* the village market for the necessaries of life.

These and many other characteristics of inter-state trade in oil and business prove that its control of to-day does not insure such control next week ,and he who wins, and therefore exclusively controls the spring trade, has not won the fall trade, and the danger of a monopoly is rendered less imminent and not serious so long as the doors of competition are not locked. Leave them open, and the law of trade corrects seeming errors.

Competition knows no limit except that the means used must be lawful. Academic treatises which talk of *unfair* competition and *undue* competition and *unreasonable* competition find no authority in the settled decisions of England or of this country. Each individual's fundamental right is to compete for all the inter-state trade if he so elects. His liberty so to do is not restricted by saying that he must use in the compe-

tition fair or reasonable skill or ingenuity or means of warfare. How could the law measure and define what was fair, what reasonable and what undue? God gives to one man unusual skill and aptitude in some branch of trade—or in many branches—for example, Edison. To limit him is to deny to the world at large the manifold advantages of his skill and ingenuity. Such skill will in a large degree give to him temporarily the control of whatever branch of trade he enters, but if honestly acquired, the law awards it. He may use any means which does not infringe upon the legal rights of his fellow citizens. If he uses any means which interferes with such right, this is unlawful, and he may not use it. But aside from this limitation, the choice of weapons and of means, is his own; the war is on, and each competitor may use all means which his wealth, his connections, his study, his superior skill or knowledge may give him.

Awards of Competition.

The law not only allows, but it awards, and by all means protects, the winner in the acquisition and use of the prize he gains by competition. No matter how great the prize is, the law allows it and protects it because, unless that be so, competition would fail; for if the man who enters the lists and wins at the combat is not entitled to the trophy, there would be few lists organized and few men would submit themselves to the work and the labor and the inconvenience of the strife. Trade would be meaningless, and the incentive to industry and perseverence would be destroyed.

However large a percentage then of inter-state trade the individual or the combine or the corporation or the trust may gain, even though it should exceed eighty per cent., such does

not create a monopoly in violation of the Sherman Act unless *unlawful* means have been used to gain that result.

AUTHORITIES ON RIGHT OF COMPETITION.

In *United States vs. Freight Association,* 166 U. S., 290, 337, Mr. Justice Peckham quoted with approval the language of Judge Shiras' dissent from the decision of the Circuit Court of Appeals:

> "Competition, free and *unrestricted,* is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world."

In *Allen vs. Flood,* L. R., 1898, App. Cas. 1, 166, a case before the House of Lords, Lord Shand said the right to trade is subject to

> "competition which is in itself *lawful,* and which cannot be complained of where no *unlawful means* * * * have been employed,"

and defined unlawful means as

> "*improper means,* by which I mean be used neither *fraud* nor *violence.*" (162)

In *Commonwealth vs. Hunt,* 4 Metc. 111, 134, Chief Justice Shaw said:

> "Associations may be entered into, the object of which is to adopt measures that may have a tendency to

In 1882 the Standard interests owned, through purchase and through construction 2,468.60 miles of gathering lines and 1,062.95 miles of trunk lines (Defendant's Exhibit 261), of which latter all but about 48 miles (the Columbia Conduit Company, purchased in 1877) was entirely a Standard construction (Archbold, Vol. 17, p. 3630). From 1882 to the present time the Standard has bought (outside of the California field) only about 300 miles of pipe line (Archbold, Vol. 17, p. 3233). *The growth of the pipe lines since* 1882 ***is due to actual construction work by the Standard itself; and in*** 1908 *it owned outside of the California field* 45,227.74 *miles of gathering lines and* 9,388.91 *miles of trunk lines, making a grand total of* 54,616.65 (*Defendant's Exhibit* 261, *Vol.* 19), *over* 50,000 ***miles of which were absolutely the Standard's own construction.***

A graphic and striking illustration of the growth of the pipe line system from 1882 to 1908 is shown by defendants' Exhibit 262. The vastness of this branch of the Standard's business is shown by the fact that in 1889 the investment in pipe lines was $21,386,362.76, and in 1906 it had grown to $61,518,357.74.

In 1882, they had of these pipe lines 3,531.55 miles; in 1899 they had increased to 14,653.63 miles; in 1908 to 54,616.65 miles.

After 1882 the production of crude oil largely increased.

INCREASED PRODUCTION OF CRUDE OIL BETWEEN 1881 AND 1905.

1881	27,661,238
1882	30,349,897
1883	23,449,633
1884	24,218,439
1885	21,858,785
1886	28,064,841
1887	28,283,483
1888	27,612,025
1889	35,163,513
1890	45,823,572
1891	54,292,655
1892	50,514,657
1893	48,431,066
1894	49,344,516
1895	52,892,276
1896	60,960,361
1897	60,475,516
1898	55,364,233
1899	57,070,850
1900	63,620,529
1901	69,389,194
1902	88,766,916
1903	100,461,337
1904	117,080,960
1905	134,717,580

Reservoirs to hold the oil and prevent its destruction as heretofore, became necessary, and millions of dollars were invested by these men in their construction, thereby saving the oil for thousands of producers who otherwise would have lost the same. In 1906 they had about 80,000,000 barrels of crude oil stored.

In 1875, the total storage of crude oil did not exceed 3,000,000 or 4,000,000 barrels; in 1886 this had grown to 32,000,000 barrels at an investment for storage alone of about $32,000,000. In 1908 the Standard had stored about 85,000,000 barrels.

Tank cars had to be built to transport the refined oil from the refineries in the West to the Atlantic Ocean in the East, and from many refineries to many selling stations, and these men built, out of their own resources, 10,594 cars, which are now run over all the roads of the United States, taking the oil practically to the home of the consumer. In this they have invested of their own money, many millions of dollars.

Selling stations, where oil could be stored within easy reach of the consumer and delivered to the consumer speedily and without waste, were desirable, and these men have constructed in the United States 3,573 of them almost wholly with their own money, and they have other selling stations scattered all over the world.

Ships of peculiar construction were necessary to transport the refined oil to foreign ports, and these men, out of their own resources, built such ships and they now cross the Atlantic and carry millions of barrels of oil for public consumption in Europe and the East.

Investigation made it possible that the by-products of oil formerly thrown away could be utilized and made valuable, and these men, by the employment of adequate talent and skill and the expenditure of large sums of money, have produced more than twenty by-products from this crude oil which they sell all over the world.

Following are the principal by-products now produced:

Naphtha,
Gas Oil,
Fuel Oil,
Paraffine Oils,
Spindle Oil,
Wool Stocks,
Filtered Cylinder Oils,
Unfiltered Cylinder Oils,
Waxes,
Candles,
Greases,
Coke,
Pitch,
Road Oils,
Asphalt and Paving Residuums,
Roofers' Wax,
Soap Stocks,
Cordage Oils,
Acid Oils,
Turpentine Substitutes,
Engine Distillates,
Petrolatum,
Vaseline.

Naphtha sales in the United States by the Standard Refineries grew from 2,274,199 barrels of 50 gallons each in 1895, to 4,958,027 barrels in 1906.

The paraffine wax home trade grew from 37,185 tons in 1892 to 120,496 tons in 1907. The exports of the same grew from 29,846 tons in 1890 to 86,752 tons in 1906.

All these things that these men have purchased or improved have all gone to the production and sale of but one article—crude oil and its products. They have increased the sales of refined oil until in 1906 it amounted to 24,188,826 barrels of fifty gallons each.

They have increased the exportation of refined oil until in 1906 it amounted to 17,565,682 barrels of fifty gallons each.

PETITIONER'S EXHIBIT NO. 377.

(Vol. 8, page 904).

Year.	Total No. of Barrels Exported.	Exports S. O.
1900	14,788,269	13,416,486
1901	16,549,590	14,976,822
1902	15,576,020	13,899,406
1903	13,836,744	11,933,037
1904	15,227,163	13,230,096
1905	17,629,008	15,495,080
1906	17,565,682	15,159,164

By the practice of rigid economies they have reduced the expenses of the producing, transporting and refining of oil. They have practiced upon the theory of large production and small profit until refined oil is now sold to the retail dealer (less freight) at from six to ten cents per gallon—See Defdts. Ex. 293 B.

In the doing of all these things, they have employed thousands of men, and yet not one of their employes came upon the stand to complain of any unfair or even ungenerous treatment from these men. No refiners whatever, except Emery came upon the stand as a witness, and even he did not prove that by any unlawful means the appellants had forced them to sell or retire from the business.

All these different things which these men bought and built—refineries, pipe lines, reservoirs, etc.,—are naturally a part of one whole—all operated together and to and with each other—all were useful each to the other, and to be so useful must have a connection with one or more of the others. Each was naturally a companion to the other.

Many of these units become practically valueless if their connection with the others is severed. Of what value were refineries if the pipe line was not connected—of refineries if the crude oil was not brought to them by pipe lines—of the tank cars for refined oil unless used in connection with the refineries—of the selling stations unless supplied from refineries?

There are many parts, but each part has its place, and if a part is taken out, the whole structure is disintegrated.

THE SUCCESS OF THE STANDARD OIL GROUP, GREAT AS IT IS DID NOT CREATE A MONOPOLY OF THE BUSINESS.

TAKE REFINERIES—

DEFENDANT'S EXHIBIT 277.

COMPETITIVE REFINERIES.

District.	Name and Location.
New York Harbor.....	Columbia Oil Co., Constable Hook, N. J.
	Valvoline Oil Co., Edgewater, N. J.
Philadelphia	Manufacturers' Paraffine Co., Phila., Pa. (formerly Paragon Oil Co.).
	Enterprise Oil Works, Phila., Pa.
	Sunlight Oil & Refining Co., Phila., Pa.
	Pure Oil Co., Marcus Hook, Pa.
	National Refining Co., Marcus Hook, Pa.
	Sun Company, Marcus Hook, Pa.
Pgh., Pa., and vicinity..	Crew-Levick & Co., Marcus Hook, Pa.
	Beaver Refining Co., Washington, Pa.
	Canfield Oil Co., Coraopolis, Pa.
	Freedom Oil Works, Freedom, Pa.
	Island Petroleum Co., Neville Island, Pa.
	West Pittsburg Oil Refg. Co., Neville Island, Pa.
	Lake Carriers Oil Co., Coraopolis, Pa.
	Miller's, A. D., Sons Co., Allegheny, Pa.
	Pittsburg Oil Refining Co., Coraopolis, Pa.
	Waverly Oil Works, Pittsburg, Pa.
Other oil region points..	American Oil Works, Titusville, Pa.
	Cold Water Oil Co., Raymilton, Pa.
	Conewango Refining Co., Warren, Pa.
	Continental Refining Co., Oil City, Pa.
	Cornplanter Refining Co., Warren, Pa.
	Crystal Oil Works, Oil City, Pa.
	Dougherty, W. H. & Sons, Petrolia, Pa.
	Emery, Mfg. Co., Bradford, Pa.
	Emlenton Refining Co., Emlenton, Pa.
	Empire Oil Works, Oil City, Pa.
	Franklin & Raymilton Refining Co., Raymilton, Pa.
	Germania Refining Co., Oil City, Pa.
	Glade Oil Works, Warren, Pa.
	Independent Refining Co., Oil City, Pa.
	Levi Smith, Clarendon, Pa.
	Penn Lubricating Co., Bradford, Pa.
	Penna. Refining Co., Karns City, Pa.
	Penn Refining Co., Oil City, Pa.
	Penna. Paraffine Works, Titusville, Pa.
	Seneca Oil Works, Warren, Pa.
	Superior Oil Works, Warren, Pa.
	Tiona Refining Co., Clarendon, Pa.
	Titusville Oil Works, Titusville, Pa.
	United Refining Co., Struthers, Pa.
	Valvoline Oil Co., East Butler, Pa.
	Warren Refining Co., Warren, Pa.
	Wellsville Refining Co., Wellsville, N. Y.
	Wilburine Oil Works, Warren, Pa.
Ohio	National Refining Co., Marietta, O.
	Sterling Oil Works, Marietta, O.
	National Refining Co., Cleveland, O.
	Craig Oil Co., Toledo, O.
	Canfield Oil Co., Findlay, O. (purchased by National Refining Co.).
	National Refining Co., Findlay, O.
	Paragon Refining Co., Toledo, O.
	Wyandot Refineries Co., Crawford, O. (formerly Wyandot Producing & Refg. Co.).
	Sun Oil Co., Toledo, Ohio.

COMPETITIVE REFINERIES—Continued.

District.	Name and Location.
Kansas	Caney Refining Co., Caney, Kas.
	Chanute Austin Refining Co., Chanute, Kans.
	Eastern Kansas Oil Refinery, Moran, Kas.
	Great Western Oil Refining Co., Erie, Kas.
	Kansas & Texas Oil, Gas & Pipe Line Co., Chanute, Kas.
	Kansas City Oil Co., Kansas City, Kas. (formerly Kansas City Oil & Gas Co.).
	Kansas Co-Operative Refining Co., Chanute, Kas.
	Kansas Crude Oil & Gas Co., Chanute, Kas.
	Kansas Oil Refining Co., Chanute, Kas.
	National Refining Co., Coffeyville, Kas.
	Paola Refining Co., Paola, Kas.
	Petrolia Refining Co., Petrolia, Kas.
	Rollin Refining Co., Rollin, Kas.
	Standard Asphalt & Rubber Co., Independence, Kas.
	Sunflower Oil Co. Niotaze, Kas.
	Superior Refining Co., Longton, Kas.
	Uncle Sam Oil Co., Atchison, Kas.
	Uncle Sam Oil Co., Cherryvale, Kas.
	Webster Refining Co., Humboldt, Kas.
Oklahoma	Chelsea Refining Co., Chelsea, Okla.
	Muskogee Refining Co., Muskogee, Okla.
	Oklahoma Refining Co., Oklahoma City, Okla.
	Tulsa Refining Co., Tulsa, Okla.
	Uncle Sam Oil Co., Tulsa, Okla.
	Webster Refining Co., Okmulgee, Okla.
Illinois	Leader Oil Co., Casey, Ill. (Cornplanter Refg. Co.).
	Mid-Continent Oil Refg. Co., E. St. Louis, Ill.
	Robinson Oil Refining Co., Robinson, Ill.
	Union Oil Co., East St. Louis, Ill.
Kentucky	Indian Oil Refining Co., Georgetown, Ky.
Colorado	Boulder Refinery, Boulder, Colo.
	Colorado Refining & Oil Co., Boulder, Colo.
Wyoming	Pittsburg-Salt Lake Oil Co., Spring Valley, Wym.
California	Capitol Refining Co., Stockyards, Cal.
Alameda County	Pacific States Refineries, Fruitvale.
	Paraffine Paint Co., Oakland.
Contra Costa County	Western Oil Refg. & Mfg. Co., Rodeo.
	Union Oil Co. of California, Oleum.
Fresno County	California Fresno Oil Co., Fresno.
Kern County	Buckeye Refg. Co., Kern River Field (formerly Clark Oil Refg. Co.).
	Sunset Oil & Rfg. Co., Sunset Field.
Los Angeles County	Asphaltum & Oil Refg. Co., Los Angeles.
	Atlas Refining Co., Los Angeles (formerly 2 refineries; New Franklin Oil Co. and Atlas Reduction Co.).
	British California Oil Co., Los Angeles.
	Densmore Stabler Refg. Co., Los Angeles.
	Hercules Oil Co., Los Angeles.
	Jordan Refining Co., Los Angeles (formerly Meridian Oil Co.).
	Los Angeles Refg. Co., Los Angeles.
	Southern Refining Co., Los Angeles.
	Sunset Oil & Refg. Co., Obispo.
	Union Consolidated Oil Co., Los Angeles.
San Bernardino County	Puente Oil Co., Chino.
San Luis Obispo County	California Petroleum Refineries, Oilport.
Santa Barbara County	Associated Oil Co., Alcatraz (formerly Alcatraz Asphalt Co.)
Ventura County	Santa Paula Oil Co., Santa Paula.

District.	Name and Location.
Texas	Central Asphalt Works, Port Neches, Tex. (sometimes known as Evangeline Oil Co., taken over by Texas Co.).
	United Oil & Refining Co., Beaumont, Tex. (formerly National Refg. Co., U. S. Oil & Refg. Co., Union Oil & Refg. Co.).
	Higgins Oil & Fuel Co., Beaumont, Texas.
	Great Southern Oil Co., Beaumont, Tex. (W. H. Sturman, of N. Y., receiver).
	San Jacinto Oil Ref. & Tank Car Co., Corsicana, Tex. (leased by Richardson-Gay Oil Co.).
	Southwestern Oil Co., Houston, Tex.
	Gulf Refining Co., Plant No. 2, Port Arthur, Tex.
	Gulf Refining Co. Plant No. 3, Port Arthur, Tex.
	The Texas Co., Port Arthur, Tex.
	Howard Refining Co., Port Arthur, Tex. (formerly the Colonia Ref. Co.).
Louisiana	Jennings Refining Co., Jennings, La. (formerly Union Oil & Refining Co.).
	Record Oil Refining Co., Port Chalmette, La.
	National Oil Works & Mill Supply Co., New Orleans, La.

We exported in 1900 of refined oil 90.8 per cent., but in 1906 only 86.3 per cent.

We produced of crude oil in 1900 31.27 per cent., but in 1906 only 11.11 per cent.

In 1894 the Standard sold of the domestic trade 62.44 per cent. or refined oil, but in 1906 only 37 per cent.

The study of the oil industry from 1865 to date will demonstrate the following:

(a) The proper development of that business required very large combinations of capital and skill.

(b) That development economically accomplished required the association of the crude oil well—the gathering lines—the reservoirs—the refineries—the tank cars—the ocean steamship vessels—the long distance pipe lines—the selling stations—and other facilities.

(c) It required large capital to be successively used in experiments whereby refractory crude oil such as the Lima oil, was made fit for use; whereby by-products for years thrown away were made useful commodities for human consumption.

(d) The shifting nature of the oil production from Pennsylvania to California, to Texas, to Oklahoma and other fields, and the necessity of the caring for the *oil* just as produced, were additional reasons for large capital.

(e) No ordinary organization could have done this.

(f) Then consider the foreign business, the ocean steamers to carry the oil, the selling stations all over Europe and Asia.

This group of men, the appellants, has done all this.

Have created property—have created wealth—have added to the wealth of our country and its taxable property.

Have done it with their own means and skill and industry.

Worked at it from 1865 to 1910. Risked their fortunes in its development.

And yet in 1910 a Court sitting in equity struck their organization down.

Not because they were doing unlawful things—

But simply because they made a mistake as to the method in which they could the better hold their combined properties.

Respectfully submitted.

D. T. WATSON,
JOHN M. FREEMAN,
ERNEST C. IRWIN,
For Appellants.

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APPENDIX.

THE SHERMAN ACT.

(An act to protect trade and commerce against unlawful restraints and monopolies.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce

in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Teritories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which

the court is held or not; and subpoenas to that end may be served in any district by the marshall thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in Section one of this Act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," whereever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

The purpose of the Sherman Act was to free interstate trade and further competition.

In the *Northern Securities case,* 193 U. S., 331, the Supreme Court of the United States said that Congress, by the Anti-Trust act,

> "has prescribed the rule of free competition among those engaged in such commerce."

That combinations whose tendency is

> "to deprive the public of the advantages that follow from free competition"

are forbidden by the Sherman act.

On page 337 the Court said that the Sherman Act prescribed that interstate trade should not be vexed by combinations

> "which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule because in all the prior *cases* in this Court the Anti-Trust Act has been construed as forbidding any combination which, by its necessary operation, destroys or restricts *free competition* among those engaged in interstate commerce. In other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce."

In the *Joint Traffic Association case*, 171 U. S., 569, the Supreme Court of the United States said that the contract in that case

> "affects interstate commerce by *destroying competition;*"

and then on the same page said:

> "Has not Congress with regard to interstate commerce and in the course of regulating it in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition?"

Again, on page 570, the Court said:

> "* * * we think Congress is competent to forbid any agreement or combination among them by means of which *competition* is to be smothered."

Again on the same page the Court said that Congress could prohibit contracts,

"*which would* extinguish all competition."

The Court said (p. 571) that the evil of the agreement in that case was the

"stifling competition."

The Court said (p. 575) that Counsel had insisted that the stifling of competition did not necessarily restrain commerce, to which the Court replied (577):

> "The natural, direct and immediate effect of competition is, however, to lower rates and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement whose first and direct effect is to prevent this play of competition restrains instead of promoting trade and commerce."

Again, on the same page, the Court said:

> "An agreement of the nature of this one which directly and effectually stifles competition must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition. * * *"

Addyston Pipe case, 175 U. S., 211.

A combination restrains trade if its

"direct and immediate effect is to destroy competition."

(244)

In *Swift & Company vs.* U. S., 196 U. S., 375, the Court stated that the purpose of the combination was

"to monopolize the commerce and prevent competition."

(375)

And that the defendants were

> "intending to monopolize the said commerce, and to prevent competition." (659)

In *United States vs. Freight Association*, 166 U. S., 337, the Court said:

> "Competition *free* and *unrestricted* is the general rule which governs all the ordinary business pursuits and transactions of life. Evils as well as benefits result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker. Fluctuations in prices may be caused that result in wreck and disaster, yet balancing the benefits as against the evils the law of competition remains as a controlling element in the business world."

United States vs. E. C. Knight Co., 156 U. S., 16, Fuller.

Hopkins vs. United States, 171 U. S., 587.
Anderson vs. United States, 171 U. S., 617.

Bement vs. National Harrow Co., 186 U. S., 94.

The agreement was held valid because it

> "had no purpose to stifle competition."

Montague & Co. vs. Lowry, 193 U. S., 46.

Harriman vs. United States, 197 U. S., 291.

Chattanooga Foundry vs. Atlanta, 203 U. S., 396, Holmes, J.:

"One object of the combination was to prevent other producers * * * from *competing.*"

Shawnee Compress Co. vs. Anderson, 209 U. S., 435, McKenna, J., approved the state court's statement holding the lease illegal, because

"*competition* within that district is *annihilated.*"

Waters-Pierce Oil Co. vs. Texas, 212 U. S., 110, Day, J.: The Sherman Act condemns any combination which tends

"to deprive the public of the advantages which flow from a *free competition.*"

Continental Wall Paper vs. Voight & Sons Co., 212 U. S., 256.

CONSTITUTIONAL RIGHTS OF CITIZENS.

Authorities continued from p. 213 of brief.

In the *Butchers' Union Company v. Crescent City Company*, 111 U. S. 762, Justices Bradley, Harlan and Woods agreed that

> *"The right to follow any of the common occupations of life is an inalienable right."*

People vs. Max, 99 New York, 386,
Bertholf vs. O'Reilly, 74 New York, 515.

In re Jacobs, 31 Alb. L. J. 85.

"The general rule is that every person *sui juris* has a right to choose his own employment and to devote his labor to any calling."

Cooley's Principles of Con. Law, p. 231.

In *Munn vs. Illinois*, 94 U. S., 142, Mr. Justice Strong and Field held that,

> "By the term liberty, as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means *freedom to go where one my choose*, and *to act in such manner*, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; *that is to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment.*"

In *Allgeyer vs. Louisiana*, 165 U. S., 578-589, the Court said:

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere

physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Smyth vs. Ames, 169 U. S., 522 (1897):

"By the Fourteenth Amendment, it is provided that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this amendment is now settled."

Santa Clara County vs. Southern Pacific R. R., 118 U. S. 394-596;

Charlotte, Columbia & Augusta R. R. Co. vs. Gibbes, 142 U. S., 386, 391;

Gulf, Colorado & Santa Fe Railroad Co. vs. Ellis, 165 U. S., 150, 154.

In *Western Union Telegraph Co. vs. Kansas*, 216 U. S. 1, 21, decided January 17, 1910, Mr. Justice Harlan quoted with approval the language of Mr. Justice Bradley in *Crutcher vs. Kentucky*, 141 U. S., 57:

"To carry on *interstate commerce* is not a franchise or a privilege granted by the State; it is a *right which every citizen of the United States* is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect of *depriving them of such right*, unless Congress should see fit to interpose some contrary regulation on the subject. * * *"

FEDERAL COMMON LAW.

(Continued from page 229 of brief).

Western Union Telegraph Co. vs. Call Publishing Company, 181 U. S., 92, distinguished.

In an action begun in a state court, the Telegraph Company was held liable for discrimination in its charges between plaintiff and a rival company. The question involved required simply a determination of the *private rights* of two *litigants inter se.*

But when the United States seeks to restrain or prevent combinations in restraint of trade, or monopolies, a different case is presented. No question of private rights is to be determined. Combinations to restrain or monopolize interstate commerce are not prohibited because they violate the *private right* of any litigant. They are illegal because they *offend* against the *public policy* of the United States. To contravene public policy is an offense against the rights of the public, a violation of the protection afforded by the Government; and in determining what amounts to such offense or violation, the private rights of particular individuals are ignored, oftentimes sacrificed.

As Mr. Justice Holmes said in *Beasley vs. Texas, Etc. R. R. Co.,* 191 U. S., 498:

> "The very meaning of public policy is the interest of others than the parties."

When, therefore, the Court enjoins the commission of an act because it is in contravention of public policy, its purpose in doing so is to protect the rights of the public, and vindicate the authority of the Government to protect its people from harm.

A violation of public policy is an offense against the public in much the same way as a violation of a criminal law is. In a word, the doctrines of public policy lie within the border-land of the criminal law. There are no crimes against the Federal Government until Congress defines them; nor are there any rules of public policy under the Federal Government till Congress prescribes them.

The Sherman Act is a criminal statute through and through. It contains three distinct prohibitions in the first three Sections respectively; and *the violation of each is made a crime.* There is not a single act forbidden by the statute, the doing of which is not declared criminal. Congress enacted the statute evidently because it shared the view expressed by Mr. Justice Harlan in *United States vs. E. C. Knight Co.,* 156 U. S. 1, 15:

> "Such combinations (to destroy competition) are against common right and are *crimes against the public.*"

Missouri-Pacific Railway Co. vs. Larabee Flour Mills Co., 211 U. S., 612 (decided Jan. 11th, 1909):

The Supreme Court of Kansas awarded a shipper a mandamus to compel a railway company to afford equal local switching service for cars engaged in interstate commerce. On a writ of error to the United States Supreme Court the Railway Company contended that its duties were regulated entirely by the Federal law, and that until the Federal Interstate Commerce Commission acted, the shipper could have no remedy, and that, in any event, the shipper would have no remedy in the State Court.

The Supreme Court, in an opinion by Mr. Justice Brewer, held that the rights of the shipper fell within the

familiar rule that until Congress acts, a state may make regulations of local matters conducive to the welfare and convenience of its citizens; and that until Congress acted the common law of the state applied in such a case.

Mr. Justice Brewer said:

> "* * * the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commission the control of the State over these incidental matters remains undisturbed. * * * This common law duty the State, in a case like the present, may, at least in the absence of Congressional action, compel a carrier to discharge."

The Supreme Court has uniformly held that as to matters which are national in character and admit of only one uniform system of regulation, the power of Congress to regulate interstate commerce is exclusive; and that the inaction of Congress in such matters amounts to a declaration that such interstate commerce shall be free from regulation by the State. On the other hand, it has held, as it does in the Larabee Mills case, above, that as to matters which are local and incidental, the State may make regulations conducive to the welfare and convenience of its citizens.

The Larabee Mills Case applies the same distinction in determining what portion of the common law of the State governs interstate commerce. The Court, Mr. Justice Brewer, at some length explains this distinction and holds that the common law of the state applied in that case, because the question involved related simply to local and incidental matters conducive to the welfare and convenience of the citizens of the State. It must, therefore follow that as to matters which are national in character and admit of only one uniform system of regulation, the common law of the State cannot apply, just as the statute law of the state cannot apply in such a case.

Within which class of cases does the question of the validity of a combination in restraint of interstate commerce fall? The question of the validity of such a combination affecting interstate commerce, and existing and operating throughout several states, is obviously national and must be determined by one uniform rule. If the validity of such a combination were to be tested by the common law of the state in which the Federal Court sits, as questions of private rights are, the same combination would be held legal in one state and illegal in the other. The legality of a combination in interstate commerce must therefore be determined by a uniform rule of public policy which cannot exist until Congress applies it. Until Congress acts there is no law forbidding or declaring illegal combinations in restraint of interstate commerce.

The common law which governs such questions as are local and affects interstate commerce only incidentally and are conductive to the welfare and convenience of the state citizens, is the *common law of the state*. It is because these rules of the common law of the state, are local and

affect interstate commerce incidently, just as certain statutes of the state do, that these rules of the common law are enforced until Congress acts and supplies a uniform rule which supersedes them.

But until Congress does act, the Federal Court in deciding such local and in cidental questions applies the common law of the State, and not a federal or interstate common law.

Thus in *Western Union Telegraph Co. vs. Call Publishing Co.,* 181 U. S., 92, Mr. Justice Brewer quoted the language of Mr. Justice Matthews in *Smith vs. Alabama,* 124 U. S., 465, as follows:

> "The law as applied (to interstate commerce) is none the less the law of that state." (p. 478).
>
> Mr. Justice Brewer's comment on this language is
>
> "Properly understood, no exceptions can be taken to declarations of this kind. There is *no body of federal common law separate and distinct from the common law existing in the several states,* in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. * * * We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment."

In *Walker vs. Globe Newspaper Co.,* 140 Fed., 305, 306 (C. C. A. First Circuit, 1905) Circuit Judge Putnam said as to a common law governing interstate commerce:

> "As required by the various provisions of the revised statutes which, so far as rights are concerned, adopt the statutory or common law of the state, where the cause of action arose, * * * it is the laws of those states which we are to ascertain."

In a later decision of the Supreme Court—*Kansas vs. Colorado,* 206 U. S., 46, 97, the question was as to the relative riparian rights of two states in an interstate stream. Mr. Justice Brewer reviewed the Western Union Telegraph Case, and added:

> "* * the question of the extent and the limitations of the rights of the two States becomes a matter of justifiable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called *interstate common law.*"

As Mr. Justice Brewer said, the rules which the Supreme Court applies in deciding disputes between sovereign states are really the rules of international law.

Furthermore the Constitution confers upon the Supreme Court jurisdiction to determine controversies between states, just as jurisdiction is conferred to determine controversies between citizens of different states.

Authorities continued from p. 232 of brief.

In *Smith vs. Alabama,* 124 U. S., 464, 477, 479. A statute of Alabama requiring locomotive engineers to obtain a license from the State authorities was held not void as a regulation of interstate commerce.

Mr. Justice Mathews said:

"But for the provisions on the subject found in the local law of each State there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto,* to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress, or presumed to be adopted by it, *there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals.* In other words, if the law of the particular States does not govern that relation, and prescribe the rights and duties which it implies, *then there is and can be no law that does until Congress expressly supplies it,* or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce."

* * * * * * * * *

"*Wheaton vs. Peters,* 8 Pet., 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the Courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illus-

trated in the case of *Railroad Co. vs. Lockwood,* 17 Wall, 357, where the common law prevailing in the State of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied was none the less the law of that State."

In *United States vs. Hudson,* 7 Cranch, 32, the Court held that the Federal Courts have no common law jurisdiction in criminal cases, and sustained a demurrer to an indictment for libel on the President and Congress.

United States vs. Britton, 108 U. S., 199, 206:

"*There are no common law offenses against the United States*: *United States vs. Hudson,* 7 Cranch, 32; *United States vs. Coolidge,* 1 Wheat, 415."

Manchester vs. Massachusetts, 139 U. S., 240, 262:

"The Courts of the United States, merely by virtue of this grant of judicial power, and in the absence of legislation by Congress, have no criminal jurisdiction whatever. The criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States: *Butler vs. Boston & Savannah Steamship Co.,* 130 U. S., 527; *The Belfast,* 7 Wall, 624; *The Eagle,* 8 Wall., 15; *Leon vs. Galceran,* 11 Wall., 185; *Steamboat Co. vs. Chase,* 16 Wall, 522; S. C. 9 R. I., 419; *Schoonmaker vs. Gilmore,* 102 U. S., 118; *Insurance Co. vs. Dunham,* 11 Wall., 1; *Jones vs. United States,* 137 U. S., 202, 211."

United States vs. Eaton, 144 U. S., 677, 687:

"It is well settled that there are no common law offenses against the United States: *United States vs.*

Hudson, 7 Cranch, 32; *United States vs. Coolidge*, 1 Wheat., 415; *United States vs. Britton*, 108 U. S., 199, 206; *Manchester vs. Massachusetts*, 139 U. S., 240, 262, 263, and cases there cited."

Pettibone vs. United States, 148 U. S., 197, 203. Chief Justice Fuller:

"The Courts of the United States have *no jurisdiction* over offenses not made punishable by the Constitution, laws or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated."

Cooley's Const. Lim., page 47:

"And although the Courts of the United States administer the common law in many cases they *can recognize as offenses against the nation ONLY* those acts which are made criminal and their punishment provided for by acts of Congress."

In *Willamette Iron Bridge Co. vs. Hatch*, 125 U. S., 1, 8, Mr. Justice Bradley said:

"The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. *But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers*, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced (a point which we do not undertake to decide) it would not avail to sustain the bill in equity filed in the original cases. *There must be a direct statute of the*

United States in order to bring within the scope of its laws, as administered by the Courts of law and equity, obstructions and nuisances in navigable streams within the States. Such obstructions and nuisances are offenses against the laws of the States within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against United States laws which do not exist; and none such exist except what are to be found on the statute book. Of course, where the litigant parties are citizens of different States, the Circuit Courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this Court, that it is almost superfluous to cite authorities on the subject. We refer to the following by way of illustration: *Willson vs. Black Bird Creek Co.,* 2 Pet., 245; *Pollard's Lessee vs. Hagan,* 3 How., 212, 229; *Passaic Bridges,* 3 Wall., 782 App.; *Gilman vs. Philadelphia,* 3 Wall., 713, 724; *Pound vs. Turck,* 95 U. S., 459; *Escanaba Co. vs. Chicago,* 107 U. S., 678; *Cardwell vs. American Bridge Company,* 113 U. S., 205; *Hamilton vs. Vicksburg, etc., Railroad Co.,* 119 U. S., 280; *Huse vs. Glover,* 119 U. S., 543; *Sands vs. Manistee River Imp. Co.,* 123 U. S., 288; *Transportation Co. vs. Parkersburg,* 107 U. S., 691, 700. The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable, or not conformable, to the State law relied on, is a State question, not a Federal one. The failure of State functionaries to prosecute for breaches of the State law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence."

STATE CASES ON TRUST AGREEMENT OF 1882.

Authorities continued from p. 238 of brief.

Our case differs widely from the cases of the *Glucose Company* (55 N. E. Rep., 577), the *Chicago Trust case* (130 Ill., 268), the *Sugar Refining case* (54 Hun., N. Y.), the *Distilling & Cattle Feeding case* (156 Ills., 458), the *Whiskey Trust* (29 Neb., 700), and all that class of cases which the Government cites.

(1) In all those cases there was a combination between independent competing corporations in the same line of business by which the competition was to cease, by which a committee or like power was to be appointed to fix prices for all, and by which a committee or like power was to regulate the production of each. In this way, competition ceased, prices were arbitrary and the production was the same, and the public suffered.

(2) In some of those cases as in the *Chicago Gas case,* it was the attempted combination of independent gas companies, each having a public aspect, i. e., the service to the public, and each having public grants of power which put them under peculiar duties to the public, and where the least combination between them by which competition would be restricted, the power to raise prices given, or the production controlled, is forbidden by the law (the *Baltimore Gas case,* 130 U. S., 396).

(3) In each one of those cases, including now the case of the *State of Ohio against the Standard Oil Company* (49 Ohio State, 137), the court found as a fact *that the purpose*

of the combination was to prevent competition and gain a monopoly by the illegal means of preventing competition.

Thus in the Standard Oil Trust case, the court said *inter alia* (49 Ohio State, 137) that the Standard Oil Trust agreement of 1882 was

> "* * * organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining and dealing in it and all its products, throughout the entire country, and by which it might not merely control the production, but the prices at its pleasure. All such associations are contrary to the policy of our state, and void."

In the *North River Sugar Refining Case* (54th Hun., 354) the court said that the purpose of the combination in the case was to restrict competition and obtain a monopoly.

In the *Whiskey Trust Case,* 29 Neb., 700, 719, the Court said that the distillers had formed a pool to prevent overproduction and prevent lower prices, and that

> "the findings in this case, to which no objection is made, merely show that the object of the Distilling Company in entering into the illegal combination was to destroy competition and create a monopoly * * *."

In the *Distilling and Cattle Feeding Company Case,* 156 Ill., 458, among other things, the court held that (486):

> "There can be no doubt, we think, that the Distillers and Cattle Feeders' Trust, which preceded the incorporation of the defendant, was an organization which contravened well established principles of public policy,

and that it was therefore illegal. No one who intelligently considered the scheme of this trust as detailed in the information can for a moment doubt that it was designed to be, and was in fact a combination in restraint of trade, and that it was organized for the purpose of getting control of the manufacture and sale of all distillery products, so as to stifle competition, and to be able to dictate the amount to be manufactured and the prices at which the same should be sold, and thus to create, or tend to create a virtual monopoly in the manufacture and sale of products of that character.

In the *Chicago Gas Trust Case*, 130 Ill., 268, there were four separate and independent gas companies doing business in the City of Chicago, and a new corporation was formed for the express purpose of controlling all four of those, acting in the common interest of one company, and it was held to be illegal. (292, 293).

> "The control of the four companies by the appellee, —an outside and independent corporation,—suppresses competition between them and destroys their diversity of interest and all motive for competition. There is thus built up a virtual monopoly in the manufacture and sale of gas. * * * Whatever tends to prevent competition between those engaged in a public employment or business impressed with a public character, is opposed to public policy, and, therefore, unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy."

In the *Glucose case*, 182 Ill., 551, 55 N. E. Rep., 577, stockholders of many independent and competing corporations had put their stock into the hands of a certain trust for the

purpose of controlling prices, limiting production, and suppressing competition; and the court said: (663)

"The transfer of its property, made by the American Glucose Company, was a transfer to a corporation, created for the express purpose of taking its property, and the property of other corporations, so as to use them in the *suppression of competition*, and in the creation of a monopoly in the manufacture of glucose and grape sugar and their products and by-products. The whole scheme, as devised and consummated, was a fraud, not only on the public, but upon the dissenting stockholder filing this bill."

In the case of *Dunbar vs. American Telephone Company*, 238 Ill., 456, 79 N. E., 423, 426, in the Supreme Court of Illinois, the court said:

"* * * it sufficiently shows, against a general demurrer, that the American Company, through the defendant Barton and others, became the purchaser of the shares of stock with the unlawful purpose and intention of putting the Kellogg Company out of business, or so using and controlling it as to prevent rivalry in business and creating a monopoly, and it called for an answer from defendants. If such was the purpose and object of the purchase, the decisions of this court are full to the effect that the law will not lend its aid to accomplish the object."

In the *National Lead Trust Case*, 80 Mo. Appeal, 247, 266, the court held that it

"* * * was an unlawful combination, both in purpose and fact, is sufficiently established by the nature of the agreement under which it was created and the

methods and practices resorted to in furtherance of that agreement. The agreement in question can only be construed as a contract to suppress competition, fix the price of commodities, and limit their production, and to restrain trade."

(4) In each of those cases it was the combination of pre-existing, independent corporations, and in no case was there any pretense that the trust agreement was used merely for the purpose of the more easily handling an already pre-existing, non-competing unit or business which had been fostered and nurtured from its beginning, and where the trust agreement was used merely for convenience in the handling of property already owned. In our case it had no purpose of preventing competition or fixing prices or controlling production. It was simply and only a convenient method of holding properties in the evolution and development of a legitimate, lawful business in the manufacture, production, transportation and sale of crude oil.

TRUST AGREEMENT VALID.

As the Trust Agreement of 1882 was not void under any Federal common law, the continuance of it until 1899 (which we deny), was not illegal; and when, in 1899, the joint owners of all these properties saw fit to convey them to a corporation of the State of New Jersey, and in this manner to control and use and regulate them, this was not of itself a restraint of trade or a monopoly under the Sherman Act. The case bears no relation whatever to the Northern Securities Case which, in brief, was that certain stockholders of competing railroads, who could not unite their stock to prevent competition between the roads, obtained a charter in New

Jersey to authorize them so to do; and, of course, the courts held that these people could not cite a charter of New Jersey as authorizing them to violate the laws of the United States, and especially the Sherman Act.

But in our case, the properties that were conveyed were non-competitive. They were properties jointly used and lawfully used in a lawful business. The owners of the property used the New Jersey corporation as a method or mode of holding and controlling and using the properties. This holding and owning by the New Jersey corporation did not give to the owners of the property any additional rights as was claimed in the Northern Securities Case. Indeed the Standard Oil Company of New Jersey acquired its rights from the individual owners of these properties, and these individual owners did not, by the conveyance to the New Jersey corporation, acquire any additional rights except as to the methods of holding and using and managing the property.

Here again the rights of the citizens of the United States and the method or the manner in which they may jointly hold and use property are asserted. If the laws of New Jersey authorize them through the method of a corporation to so hold and use these non-competitive groups of property, it is inconceivable that the conveyance of the property to the New Jersey corporation made a combination in restraint of trade, or as tending to a monopoly under the Sherman Act. If the joint ownership itself of the real estate and the other property and the use of them jointly by the individuals was not of itself a restraint of trade and as tending to a monopoly in violation of the Sherman Act, if these owners had still continued to hold the property in their own names, surely their conveyance to the New Jersey corporation did not make it a combination in restraint of trade or a monopoly.

(1) **Was there a Federal common law which denounced this Trust Agreement as in restraint of trade and as tending to a monopoly?**

We answer no; and while this is more fully treated in another portion of this brief, it may not be out of place here to briefly state the reasoning.

Whether or not there was in 1882 a federal common law in existence as to interstate trade under the decision of the *Western Union Telegraph* and other cases contrasted with the case of the *Willamette Bridge* and the subsequent case of *North Shore Co. vs. Nicomen Boom Co.*, 212 U. S., 412, may be a matter of grave doubt so far as the exact question in this case is concerned; but certain it is that at that time there was no Federal common law which did or could regulate the acquisition and the use of manufacturing or producing properties in the States of Ohio, Pennsylvania or other States; and this because these manufacturing or producing properties never entered into the channel of interstate trade, and were not within the jurisdiction of Congress as was fully determined in the case of *Kidd vs. Pearson* and the *Knight & Company case.*

There could be, then, no federal common law which was broader than Congressional power; that is, the courts could not declare the existence of a federal common law which Congress itself could not enact by statute, and Congress itself could not enact by statute, regulations with reference to the acquisition and use of properties in the different States.

(2) Assuming there was such a federal common law which the agreement violated—What then?

In this case, these properties and the rights of the trustees to hold them are not directly involved, because the only thing that has entered into interstate commerce is the crude and refined oil; the refineries and producing oil wells and pipe lines have never entered into interstate commerce. They are all state constructions and owned under the laws of the different states in which they are located. Now admitting, *arguendo*, that the Trust Agreement of 1882 was against the policy of the State of Ohio, Ohio never did declare that the title to the property was in any way vitiated or taken away from the owners of the property by this conveyance in 1882. There never has been a forfeiture declared or even suggested. All that enters into interstate trade is either the crude oil produced at the wells or the refined oil and its products, which, in part and in great part, depends upon the use of the producing oil wells and the refineries. No one supposes, even if A B owns the title to a refinery or a steel mill or other manufacturing property, that because his title might be defective to the real estate that he did not have title to the things produced by the use of it; as, for example, refined oil and its products and steel rails, etc. Especially is this true as to the federal law. The United States does not examine the title and the methods by which the property put into interstate channels is acquired. It does not demand of the person who is engaged in interstate trade that he show the abstract of title to the things which he is transferring. Indeed, it does not concern itself with the title at all, and the regulations which Congress may make as to interstate trade do not, as the *Knight & Company* case fully show, extend to the question of the acquisition and ownership of the real estate and property located in the states, because that is not part of commerce between the states.

When the trust agreement was dissolved in 1892, there was no separate conveyance by the Trustees to any one of the cestuis que trustent of any particular thing; i. e., particular piece of property. All of the stockholders or rather the cestuis que trustent under the trust agreement of 1882 still jointly owned, as they did before, all the property; and it was this jointly owned property which was conveyed in 1899 to the Standard Oil Company of New Jersey. This property was not competitive before the dissolution, and the proof is overwhelming that there was no change in the method of the management of the property, and this the petition in equity asserts and re-asserts.

Thus the petition in this case alleges (p. 66) that the liquidating trustees named in the resolution of 1892 dissolving the trust were the same as the trustees under the Agreement of 1882, and that, with the exception of $1,579,400 worth of property, the trustees, after the dissolution in 1892, continued to unlawfully hold and control all of said property, and that none of it was returned to the original owners; and that (p.69)

> "said individual defendants continued their control and *joint ownership* and the conspiracy to control the business of said separate corporations."

And on page 68, the dissolution is said to be a *pretended dissolution;* and on page 69, is the following averment:

> "That during the said time from 1892 down to January, 1899, and notwithstanding the said decision declaring the said trust agreement void and ousting the Standard Oil Company of Ohio from the right to make said agreement and to perform the same, and notwithstanding the pretended dissolution of said trust, the indi-

vidual defendants in this action, who were liquidating trustees, *did continue to manage the affairs of all said separate corporations so engaged in said business in the same manner as they had theretofore*, under and by virtue of the terms of said trust agreement, and in violation of law and continued to elect and did elect and designate the directors, managers, and officers of all of said corporations, for the purposes and with the effect of suppressing and restraining commerce," etc.

Again on page 70, the petition alleges that in 1899 "in continuation"

of the original conspiracy and for the purpose of making that more effective, in the month of January 1899 the individual defendants caused the charter of the New Jersey corporation to be amended and (p. 72),

> "The object of forming said corporation was to acquire the stock and control of each and all of said corporations and other corporations engaged in like business, and for the purpose of operating and controlling said corporation and other corporations in the same manner as has been done by the individual defendants through said trust agreement."

The allegation then follows that the individual defendants controlled the New Jersey corporation in the same manner that they did under the trust agreement of 1882, and used the New Jersey corporation as one of the means and methods of carrying out the original conspiracy. On pages 78 and 79 it was distinctly alleged that the Standard Oil Company of New Jersey was engaged in producing, purchasing and transporting petroleum in different ways and selling it (p. 79):

> "The said individual defendants, through the said Standard Oil Trust and Standard Oil Company and their said various subsidiary corporations, have, therefore, during each and all of the years since the organiza-

tion of said Standard Oil Trust in 1882 and of said Standard Oil Company in 1899, been engaged in interstate commerce."

For the Government now to claim that there was a break in this continuity of ownership and control, and that after the dissolution of 1892 there was a distinct and independent ownership of the different companies, and that the different companies became competitive to each other, is utterly inconsistent with their own petition and their allegation in the petition as to what their case is.

The testimony of Mr. John D. Rockefeller (Vol. 16, pp. 3190-3193) is attempted to be used to prove that (which proof would directly contradict the allegations of the Government in its petition) after the dissolution the companies were independent and competing; but if the testimony of Mr. Rockefeller is read as a whole, and especially his testimony on page 3191, etc., down to page 3193, it will be seen that what he testified to was what was a fact, and that was that while all these *cestuis que trustent*, under the agreement of 1889, were still the joint owners of all these different properties (p. 3193) yet, as a fact in one sense, each one of the different corporations in each one of the different States did do its separate and independent business, as for example, the refining of oil and the sale of its own product.

Thus Mr. Rockefeller testified (p. 3193), as follows:

"I suppose that as a matter of fact these companies, all being owned by the same people, would not be managing their separate businesses, except in the way that would be most productive for all the separate businesses. * * * Well, each company does continue to manage its own business to-day, *as I understand it.* * * If

a company is organized under the laws of the State of Ohio, it is an independent corporation; and that if it is organized to conduct that business that is its function, that is what it is expected to do."

Again, on p. 3194, he said:

"The control of those different companies in each case was, as I have stated, by the stock holdings, and those companies were *then, as now,* in this common ownership. * * *

Q. After the dissolution the ownership was not the same as before the dissolution, was it?

A. There was no change of interest of the parties concerned; that is, every man had just the precise proportion of all this business that he had had before, and so fast as these trust certificates were cancelled, then, instead of having one certificate to represent that same precise interest, he had an interest in each one of those companies."

It is true, as Mr. Rockefeller testified, that there never was any agreement between the joint owners of the property; that, for example, the Standard Oil Company of Ohio should not sell its oil within a territory, say of the Standard Oil Company of Kentucky, and in that sense it is still true, but economic laws really govern that and define the competitive territory for each corporation.

This attempt, then, to vary the charges in the bill and to attempt by evident misapprehension of Mr. Rockefeller's testimony to prove the existence of distinct and independent and competing properties after 1892 must utterly fail.

COMPETITION.

Mogul Steamship Co. vs. McGregor, Gow & Co.

The number of ships carrying tea from China to London was greater than necessary for the cargoes available. Certain of the ship owners, the defendants, formed an association, from which plaintiffs were excluded, the purpose of which was to drive plaintiffs from the field, obtain a monopoly and maintain rates.

They agreed to:

FIRST. Divide the business and regulate rates.

SECOND. Offer a special rebate of five per cent. (5%) to shippers who consigned their tea exclusively in defendant's vessels.

THIRD. Threaten to dismiss their agents in China if they acted also in the interest of the plaintiffs.

FOURTH. Send special ships to underbid any vessels which plaintiffs might send.

Defendants reduced rates so low that plaintiffs were obliged to carry at unremunerative rates in order to obtain a homeward cargo for the ships which they had sent.

Plaintiffs brought an action to recover damages—which was tried without a jury before Lord Coleridge, who gave judgment for the defendant.

L. R., 21, *Q. B.* 544.

This judgment was affirmed by the Court of Appeals in L. R., 23, Q. B., 598.

In the opinion of the Court of Appeals, Lord Justice Bowen said (617-618):

"What, then, are the limitations which the law imposes on a trader in the conduct of his

business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence: *Tarleton vs. M'Gawley;* the obstruction of actors on the stage by preconcerted hissing: *Clifford vs. Brandon, Gregory vs. Brunswick;* the disturbance of wild fowl in decoys by the firing of guns: *Carrington vs. Taylor* and *Keeble vs. Hickeringill;* the impeding or threatening servants or workmen: *Garret vs. Taylor;* the inducing persons under personal contracts to break their contracts: *Bowen vs. Hall, Lumley vs. Gye,* all are *instances of such forbidden acts.* But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the *bitter end* a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill will or a *personal intention* to harm, it is sufficient to reply (as I have already pointed out) that there was here no *personal intention* to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to

the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse' acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is *not fair or reasonable.* The offering of reduced rates by the defendants in the present case is said to have been 'unfair.' This seems to assume that, apart from fraud, intimidation, molestation or obstruction, of some other personal right *in rem* or *in personam,* there is some natural standard of *'fairness'* or *'reasonableness'* (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates provided they did not lower them beyond a 'fair freight,' whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a 'fair freight?' It is said that it ought to be a normal rate of freight such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient

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of sowing one year a crop of apparently unfruitful prices, in order by *driving* competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that *Law Courts had a right* to say to them in respect of their competitive tariffs, 'Thus far shalt thou go and no further.' To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute.

* * *

"The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-stock company, limited, is a problem which might well puzzle a casuist. The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no

just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence—to use a technical expression —of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible—would be only another method of attempting to set boundaries to the tides."

His Lordship summed up on page 620 as follows:

"The substance of my view is this, that competition, however *severe* and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation or such illegalities as I have above referred to, gives rise to no cause of action at common law. I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial 'reasonableness,' or of 'normal' prices, or 'fair freights,' to which commercial adventurers, otherwise innocent, were bound to conform."

Lord Fry held the same views, and in another elaborate opinion he put the case on the same grounds as did Lord Bowen.

On page 625 he said:

"Now, I know no limits to the right of competition in the defendants—I mean, no limits in law. I

am not speaking of morals or good manners. To draw a line *between fair and unfair competition, between what is reasonable and unreasonable, passes the power* of the Courts. Competition exists when two or more persons seek to possess or to enjoy the same thing; it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with c to moderate that success or that failure so long as it is due to mere competition."

This case went to the House of Lords, Privy Council, and is reported in the Law Reports Appeal cases 1892, page 25. There Lord Halsbury, the Lord Chancellor; Lord Watson, Lord MacNaghten, Lord Bramwell, Lord Morris, Lord Field, Lord Hannen, all agreed in sustaining the decision of the Court of Appeals by Lord Bowen and Fry.

Lord Halsbury mentions the underbidding for freight at Hankow, and on page 37 he says:

"My Lords, after all, what can be meant by 'out of the ordinary course of trade?' I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.

I entirely adopt and make my own what was said by Lord Justice Bowen in the Court below: 'All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal'

standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go and no further.' "

Lord Morris said, page 49:

"The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons."

Again on page 50 Lord Morris said:

"Again, what one trader may do in respect of competition, a *body or set of traders can* lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise. *I entertain no doubt* that a body of traders, whose motive object is to promote their own trade, can combine to acquire, and thereby in so far to injure the trade of competitors, provided they do no more than is incident to such motive object, and use no *unlawful means*.

"In these days of instant communication with almost all parts of the world competition is the life of trade, and I am not aware of any stage of competition called *'fair'* intermediate between lawful and unlawful. The question of 'fairness' would be relegated to the idiosyncrasies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another."